

United States
Circuit Court of Appeals

For the Ninth Circuit.

Vol

2302

GILA VALLEY IRRIGATION DISTRICT,
FRANKLIN IRRIGATION DISTRICT,
ROY A. LAYTON, MILTON LINES, WIL-
LIAM WALDROM, ROY D. WILLIAMS,
and J. D. WILKINS,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record
In Two Volumes

VOLUME I

Vol 2 missing

Upon Appeal from the District Court of the United
States for the District of Arizona.

FILED

JUN 14 1940

PAUL P. O'BRIEN,

United States
Circuit Court of Appeals
For the Ninth Circuit.

GILA VALLEY IRRIGATION DISTRICT,
FRANKLIN IRRIGATION DISTRICT,
ROY A. LAYTON, MILTON LINES, WIL-
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic: and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States
for the District of Arizona

Globe Equity No. 59

THE UNITED STATES OF AMERICA,

vs.

GILA VALLEY IRRIGATION DISTRICT, et al.

PETITION TO REVIEW ACTION OF
WATER COMMISSIONER

Come now Gila Valley Irrigation District, an irrigation district organized and existing under the laws of the State of Arizona and embracing lands in Graham County, Arizona, Franklin Irrigation District, an irrigation district organized and existing under the laws of the State of Arizona and embracing lands in Greenlee County, Arizona, Roy A. Layton, Milton Lines and William Waldrom, as directors of said Gila Valley Irrigation District, and individually, as land owners in said Gila Valley Irrigation District, Roy D. Williams and J. D. Wilkins, as officers of Franklin Irrigation District, and individually, as land owners within said Franklin Irrigation District, (all being defendants named in the Decree entered herein on the 29th day of June, 1935), and, being aggrieved by the actions and orders of the Water Commissioner hereinafter named, in their own behalf and in behalf of all other owners of lands within said Districts and using waters from the Gila River under the pro-

visions of said decree, respectfully show the Court as follows:

I.

That heretofore, on or about the 12th day of November, 1935, this Court appointed Charles A. Firth as Water Commissioner, pursuant to the provisions contained in said decree, and the said Charles A. Firth ever since has been, and now is, the duly qualified and acting Water Commissioner under said decree. [205]

II.

That these petitioners, and all persons for whom this petition is filed as hereinbefore set forth, are aggrieved by the actions and orders of said Water Commissioner, in the following particulars:

That said decree, in Article VIII, Subsec. (2), provides in part:

“(2) That on the first day of January of each Calendar year, or as soon thereafter as there is water stored in the San Carlos Reservoir, which is available for release through the gates of the Coolidge Dam for conveyance down the channel of the Gila River and for diversion and use on the lands of the San Carlos Project for the irrigation thereof, then the Water Commissioner, provided for herein, shall, to the extent and within the limitations hereinafter stated, apportion for the ensuing irrigation year to said defendants from the natural flow of the Gila River an amount of water equal to the

above described available storage, and shall permit the diversion of said amount of water from said stream into the canals of said defendants for the irrigation of said upper valleys lands in disregard of the aforesaid prior rights of plaintiff used on lands below said reservoir; the diversion of said amount of water by said defendants to be in accord with the priorities as between themselves stated in said Priority Schedule and for the irrigation of the lands covered by the rights accredited to said defendants in said Priority Schedule and the quantity of water permitted to be taken by said defendants in disregard of prior rights of the United States below is in addition to and not exclusive of the rights of said defendants to take from the stream in the regular order of their priorities as shown by the Priority Schedule, but of course within the duty of the water limitations of this decree; that if and when at any time or from time to time in any year, water shall flow into said reservoir after said date of first apportionment and shall be stored there and become added to the available stored water in said reservoir, the said commissioner shall make further and additional apportionments to said defendants of the natural flow of said stream as the same is available at the diversion points of said defendants, which said apportionments shall in turn correspond with and be equivalent in quantity to the amount of such accessions or

newly available stored water supply; that in calculating apportionments of the stored water supply the Water Commissioner shall make appropriate deductions for losses for evaporation, seepage or otherwise that may be suffered between the time of the apportionment and that of the diversion of a corresponding quantity of water from the stream; that such apportionments, corresponding with net accessions during each annual period after first apportionment, shall be made by said Water Commissioner at least as frequently as once per calendar month (provided accessions to stored supply have occurred during that period) and at such more frequent intervals as the conditions in his judgment may demand——".

That said decree is a consent decree, and, as an in- [206] duement and consideration for entering into the same and consenting thereto, it was intended and agreed by the parties thereto that said decree should provide, and it does provide, that apportionments of the water which said Upper Valley Users should be entitled to divert from said River and use upon their said lands should be made as follows:

That, beginning on the first day of January of each year, said Commissioner should make an apportionment of water to said Upper Valley Users equal to all water then stored in said San Carlos Reservoir and available for release through the

gates of said Reservoir for use by the Lower Valley Users, less deduction for estimated evaporation; that thereafter, and upon making each additional apportionment to said Upper Valley Users during the period of said year, the said Commissioner should take into account and apportion an additional amount of water equal to all water flowing into said Reservoir since the date of the last apportionment, less an estimated allowance for seepage and evaporation and less the amount of water which, by the terms of said decree, must be delivered to Kennecott Copper Corporation, Joseph J. Anderson, Grady L. Herring and T. H. B. Glasspie.

III.

That the said Water Commissioner has, at all times since his appointment, failed and refused to apportion to petitioners and to the other land owners using waters from the Gila River, and represented by petitioners as aforesaid, the waters to which they were and are entitled under and by virtue of the provisions of said decree, but, on the contrary, has apportioned and permitted the diversion and use by petitioners and said land owners of only the amount of water determined by said Water Commissioner as follows:

That, on January first of each year, said Water Commissioner determines the amount of water then stored in the [207] San Carlos Reservoir, and which is available for release through the gates of the Coolidge Dam as of that date, and, after allowing

for estimated evaporation, apportions to the Upper Valley Users named in said decree, which includes these petitioners and said land owners, an amount of water equivalent to said stored water then in said San Carlos Reservoir less said allowance for evaporation; that thereafter, and from time to time during each year after January first, in making subsequent apportionments said Water Commissioner takes into account and makes apportionments to said Upper Valley Users of only such additional waters as have flowed into said Reservoir and have remained therein and which raise the elevations of water within said Reservoir since the date of last apportionment; and that said Water Commissioner fails and refuses to take into account all of the water which has flowed into said Reservoir since the date of his last apportionment less the water which, by the terms of said decree, must be delivered to the defendants, Kennecott Copper Corporation, Joseph J. Anderson, Grady L. Herring and T. H. B. Glasspie, and less estimated seepage and evaporation.

IV.

That these petitioners are informed and believe, and therefore allege, that, had the said Water Commissioner apportioned to the Upper Valley Users the amount of waters which they are entitled to receive under and by virtue of the terms of said decree, as hereinbefore alleged, and within the limits of said decree, the said Upper Valley Users, including these petitioners, would have received apportion-

tionments for, and have been entitled to divert and use from the Gila River, approximately one acre-foot per year for each acre of land owned by them and described in said decree, in addition to the apportionments which were in fact made to them and in addition to the amounts of water actually diverted from the Gila River and used by them on said lands. [208]

V.

That this petition is filed pursuant to the provisions of Article XII of said decree.

Wherefore, these petitioners, in their own behalf and in behalf of all other owners of lands using water from the Gila River within said Irrigation Districts, respectfully pray the Court, that it will review the actions and orders of said Water Commissioner hereinbefore complained of, and that it will order said Water Commissioner to make apportionments of water to these petitioners and to the users of water within said Districts, as provided in said decree and set forth in this petition.

RALPH W. BILBY

T. K. SHOENHAIR

CLEON T. KNAPP

JAS. P. BOYLE

B. G. THOMPSON

Attorneys for Petitioner.

State of Arizona,
County of Pima—ss.

Roy A. Layton, being first duly sworn, deposes and says: That he is one of the petitioners named in the foregoing petition; that he has read said petition and knows the contents thereof, and that each and all of the allegations contained in said petition are true, in substance and in fact, save and except those matters therein alleged upon information and belief, and, as to those matters, he believes them to be true; that affiant makes this verification in his own behalf and in behalf of all the other petitioners named in said petition.

ROY A. LAYTON

Subscribed and sworn to before me this 1st day of July, 1939.

[Notarial Seal]

J. G. LITTLEFIELD

Notary Public.

My commission expires:

January 14, 1942. [209]

[Endorsed]: Service of a Copy of the within petition upon me is hereby acknowledged this 1st day of July, 1939. C. A. Firth, Water Commissioner.

[Endorsed]: Filed Jul. 5, 1939. [210]

[Title of District Court and Cause.]

ANSWER OF PLAINTIFF TO PETITION TO
REVIEW ACTION OF WATER COMMIS-
SIONER.

Comes now the United States of America, plaintiff in the above entitled action, and, without waiving its motion heretofore filed asking that the petition to review action of Water Commission be made more definite and certain, answering the petition heretofore filed to review the action of Water Commissioner, Charles A. Firth, denies and alleges as follows:

I.

Denies the allegations contained in paragraph I of said petition, except that it is admitted that Charles A. Firth was appointed Water Commissioner on or about November 12, 1935, and that he has been the qualified and acting Water Commissioner since January 1, 1936, and that he now is such commissioner.

II.

Denies all of the allegations contained in paragraph II, except that it is admitted that the decree therein referred to contains the provisions as set out in said paragraph.

III.

Denies the allegations contained in paragraph III, and alleges, on information and belief, that the Water Com- [211] missioner has, at all times since his appointment, apportioned and diverted

waters of the Gila River to these petitioners in accordance with the provisions of said decree.

IV.

As to the allegations of paragraph IV, on information and belief, plaintiff denies that the upper-valley water users have not received, and are not now receiving, the water they were, or are, entitled to under the terms of said decree but, on the contrary, they have heretofore received all the water of the Gila River to which they are, or at any time since the entering of said decree have been, entitled under the terms thereof.

Wherefore, plaintiff prays for an order denying said petition to review action of Water Commissioner and dismissing the same.

F. E. FLYNN

United States Attorney.

State and District of Arizona,
County of Maricopa—ss.

F. E. Flynn, being first duly sworn, deposes and says, that he is the duly appointed, qualified and acting United States Attorney for the District of Arizona, and as such is attorney for plaintiff herein; that he has read the petition to review action of Water Commissioner filed herein, and knows the contents thereof; that the matters and things alleged in said petition which are denied in the foregoing answer are untrue in substance and in fact of his own knowledge, except as to the matters and

things which are therein denied upon information and belief, and as to such matters he believes it to be untrue; that the matters and things alleged in said answer are true in substance and in fact of his own knowledge, except as to those matters and things therein alleged upon information and belief and, as to such matters and things, he believes it to be true.

F. E. FLYNN

Subscribed and sworn to before me this 9 day of September, 1939.

[Seal] JEAN E. MICHAEL
Deputy Clerk, United States District Court. [212]

[Endorsed]: Receipt Is Acknowledged of a copy of the within answer this 9th day of September, 1939. Bilby & Shoehair, Knapp, Boyle & Thompson, Attorney for Petitioners.

[Endorsed]: Filed Sep. 9, 1939. [213]

[Title of District Court and Cause.]

ANSWER OF WATER COMMISSIONER TO
PETITION TO REVIEW HIS ACTIONS
AND ORDERS.

Comes now, Charles A. Firth, the duly appointed, qualified and acting Water Commissioner herein, and without waiving his motions heretofore filed herein but specifically reserving, relying and insisting upon the same, for answer to the Petition here-

tofore filed to review his actions and orders as such Water Commissioner, says,—

I.

Denies that Petitioners, or any of them, or any party named in the decree as entered in this cause, have been or are aggrieved by the actions and orders, or either, or at all, of the Water Commissioner as alleged in lines 21 and 22 of the opening statement of their Petition, or at all, but on the contrary your Water Commissioner alleges that the Petitioners, or either or any of them, have no just cause for complaint for the actions and orders, or either of them, or at all, of said Water Commissioner.

II.

Admits that part of paragraph I wherein it is alleged that on or about November 12, 1935 Charles A. Firth was appointed Water Commissioner pursuant to the provisions contained in said decree, but denies that since said date he has been the Water Commissioner, but alleges that he has been the qualified and acting Water Commissioner since January 1st 1936, and has been since said latter date and now is such Water Commissioner. [214]

III.

Denies that part of paragraph II in lines 3 and 4 on page 2, wherein it states that these Petitioners are aggrieved by the actions and orders of said Water Commissioner, but on the contrary alleges that the Petitioners, or any of them, have no just

cause for complaint on account of the actions and orders, or either, or at all, of said Water Commissioner; Admits that said decree, in Article VIII, subsec. (2), provides in part the language as set forth in lines 8 to 31 inclusive on page 2; Alleges he is without knowledge or information sufficient to form a belief as to the truth of the averment "That said decree is a consent decree", as set forth in line 32 on page 2.

Without waiving his motion to Strike heretofore filed herein, but specifically reserving, relying and insisting upon the same your Water Commissioner alleges he is without knowledge or information sufficient to form a belief as to the truth of the averment as set forth beginning in line 32 on page 2 and ending in line 3 on page 3 of paragraph II reading as follows,—

"and, as an inducement and consideration for entering into the same and consenting thereto, it was intended and agreed by the parties thereto that said decree should provide,"

and therefore denies the same; Admits that it does provide what is set forth in said decree; Denies that apportionments of the water which said upper valley users should be entitled to divert from said River and use upon their said lands should be made as set forth in lines 7 to 20 inclusive on page 3.

IV.

Denies that part of paragraph III on page 3 of the petition beginning with line 22 and ending with

the word "decree" in line 27; States that the alleged manner in which said Commissioner makes apportionments as set forth beginning with the word "but" in line 27 on page 3 to the end of paragraph 3 on page 4 of said petition, is vague, indefinite and ambiguous and [215] therefore the allegations therein set forth are denied, but alleges that the said decree provides, and your Water Commissioner has heretofore made, and is now making, apportionments of the stored waters of the San Carlos Reservoir to Petitioners in the following manner, to-wit,—

First Apportionment.

Section 2 of article VIII on page 106 of the decree provides in part as follows:

"That on the first day of January of each Calendar year, or as soon thereafter as there is water stored in the San Carlos Reservoir, which is available for release through the gates of the Coolidge dam for conveyance down the channel of the Gila River and for diversion and use on the lands of the San Carlos project for the irrigation thereof, then the Water Commissioner, provided for herein, shall, to the extent and within the limitations hereinafter stated, apportion for the ensuing irrigation year to said defendants from the natural flow of the Gila River an amount of water equal to the above described available storage" * * * *

In order to determine the amount of available stored water a capacity curve for the reservoir was prepared showing the amount of water in storage for each elevation of the water surface. Such a curve is computed by making a contour map of the reservoir basin and from this map the areas at different elevations can be measured and the amount of water stored in the reservoir for any given water surface elevation can be determined.

In order to facilitate the obtaining of these water surface elevations, and to increase the accuracy of such measurements, and to have a permanent record of such elevations, a water stage recorder has been installed on the dam which keeps a continuous graph of the lake surface elevations at all times.

In order to determine the amount of water in storage on January 1st of each year, it is only necessary to take the elevation of the water surface as shown on the recording graph for that day and from the capacity curve the amount of the available stored water can be computed. From this amount an appropriate deduction is made for losses for evaporation, seepage or otherwise as provided for in this article. As the evaporation losses are dependent upon climatic conditions, the area of the lake's surface being exposed to these conditions, and the time required to divert a corresponding quantity of water from the stream, the future losses that will take place cannot be accurately determined; so, therefore, an estimate is made based on the known conditions and past records for the

evaporation losses which amount is deducted from the available water supply. Later as these variable conditions become known and the losses can be more accurately computed, corrections are made to the original estimated losses and the apportionment is increased or decreased accordingly. No deduction for seepage loss is made from the first apportionment for the reason that such losses generally [216] occur when the water surface of the lake is ascending and additional lake bed area is being covered with water, and as the first apportionment is based on a static condition, it is not possible to estimate that any losses will occur.

In making the first apportionment the elevation of the water surface and the corresponding amount of available stored water is shown, and from this amount the estimated evaporation losses that will occur is deducted.

Additional Apportionment.

Section 2 of the same article further provides in part:

“that if and when at any time or from time to time in any year, water shall flow into said reservoir after said date of first apportionment and shall be stored there and become added to the available stored water in said reservoir, the said commissioner shall make further and additional apportionments to said defendants of the natural flow of said stream as the same is available at the diversion points of said defendants,

which said apportionments shall in turn correspond with and be equivalent in quantity to the amount of such accessions or newly available stored water supply" * * *

In order to determine when the water flowing into the reservoir is being stored it must be known when there has been an increase in the amount of available stored water. There cannot be an increase in the amount of stored water in the reservoir without there being a corresponding rise in the water surface elevation, and it is possible by means of water stage recorder to determine when such increases occur and the amount thereof. The graphs removed from the water stage recorder on the San Carlos reservoir are tabulated and whenever a MINIMUM elevation is reached the time and elevation is noted. As the water is being stored the water surface rises until a maximum elevation is reached and the time and elevation is again noted. By means of these two elevations and the use of the capacity curve the volume of water stored during that period of time can be determined. A record is kept of all such increments of gain.

From the amount of newly available stored water deductions are made for estimated additional evaporation losses which were not included in the first apportionment. These evaporation losses are later computed and proper corrections are made to the amount previously apportioned.

As to seepage losses; when the water surface of the lake is rising and additional lake bed area is being covered with water, there is a seepage loss into the banks of the reservoir, which loss is known as "bank storage" and later if the lake surface descends part of this water will return to the lake and be available for release through the dam, and this return of water is known as "bank release" and this increased amount of water is then subject to apportionment as other stored water. No deduction is made for this seepage loss from the additional stored water as previously determined for the reason that this water going into bank storage is in addition to the amount of water held in storage in the dam as determined by the capacity curve. The amount of bank release is measured by comparing the difference between inflow and outflow with the change of contents [217] of stored water in the reservoir. Inflow into the reservoir is a total of the inflow from the Gila River plus the inflow of the San Carlos River plus the rainfall on the lake. Outflow is the sum of the releases at Coolidge dam plus the evaporation losses. As an example, if 1000 acre feet of water was the inflow during any one month, and the outflow was 3000 acre feet, and the loss in storage was only 1500 acre feet, then there was 500 acre feet more water available than can be accounted for and must have come from "bank release."

Therefore, in making an additional apportionment your Water Commissioner determines as

aforesaid the increments of gain in available stored water of the reservoir since last apportionment was made. To this is added net bank storage as measured by bank release. From this total is deducted the evaporation losses from later date to estimated time of use. The difference would be the amount of water available for apportionment to the defendants, allowing them to divert an equivalent amount of water from the natural flow of the stream at their points of diversion in disregard of the senior rights of the plaintiff.

The rights of the plaintiff are set forth in the decree. Certain of these rights are a right to divert the natural flow waters of the Gila River. Inasmuch as natural flow may be defined as the flow produced by nature and that would be there in nature's own condition, the plaintiff has the right to pass the water's flowing in the rivers above the dam through the reservoir to the extent of its priorities, and to use these waters for the irrigation of its lands. Such waters passed through the reservoir as natural flow cannot be considered an addition to the stored water contents of the reservoir and therefore a like amount of water cannot be apportioned to the upper valley defendants.

However, when the senior rights of the plaintiff are being satisfied from the natural flow available and there is sufficient natural flow waters available to satisfy later priorities, the defendants are entitled to their share of this natural flow on the same basis of priorities as is the plaintiff.

Section 4 of Article VIII, further provides:

“That water released at the will of the plaintiff and for the purposes of the plaintiff from the San Carlos Reservoir at any time after the date of this decree other than for the proper irrigation of 80,000 acres of land or its equivalent in the San Carlos project, shall be considered as stored in the San Carlos Reservoir at and after the date of such releases, and available as a basis for the above described apportionment of the natural flow to said defendants as it would be if such withdrawals had never been made.”

Therefore, at any time that the plaintiff should release water in excess of the amount needed for the proper irrigation of 80,000 acres of land or its equivalent on the San Carlos Project, your commissioner shall consider such excess amount of water as stored in the reservoir and shall take such excess amount of water into consideration in making apportionments to the named defendants. [218]

The data for all apportionments are shown in detail in your commissioner's Order of Apportionment. When the total amount of water available for apportionment has been shown, this amount is divided by 40,573.75 acres of lands having water rights established by the decree under the defendant canal companies listed as sharing in the apportionment. This apportionment in acre feet per acre

makes it possible for each canal company to readily determine its share of the apportionment.

Under Arts. IX and X of the decree it is provided that certain lands in the Winkelman valley shall have apportioned to them an equal amount of water per acre as was apportioned to the named defendants in the Duncan and Safford Valleys. Therefore the apportionment states that a like amount of water in acre feet per acre is apportioned to these named Winkelman valley lands.

These apportionments of water which are a right to divert from the natural flow of the stream in disregard of the senior rights of the plaintiff named in the decree are in addition to and not exclusive of their right to divert in their regular order of priorities whenever available, and it is so stated on each apportionment order. The original copy of each apportionment is filed with the Clerk of this Court and copies are sent to the interested parties.

V.

As to paragraph IV of said petition, without waiving his motion to strike heretofore filed herein, but specifically reserving, relying and insisting upon the same, your Water Commissioner denies that the upper valley water users have not received, and are not now receiving, the amount of water they were, or are, entitled to under the terms of said decree, but on the contrary alleges that they have heretofore received and are now receiving all the water of the Gila River to which they, or either

of them, were, or are, entitled to under and by virtue of the terms of said decree.

Wherefore your Water Commissioner having fully answered said petition prays an order of this court dismissing the same and for his costs.

JOHN C. GUNG'L,

Attorney at Law

711 Valley Bank Building

Tucson, Arizona

Attorney for Water Commissioner. [219]

State of Arizona,

County of Pima—ss.

Charles A. Firth, being first duly sworn, deposes and says, That he is the duly appointed, qualified and acting Water Commissioner herein; That he has read the Petition filed herein and knows the contents thereof; That he has read the above and foregoing answer and knows the contents thereof; That the matters and things alleged in said petition and which are denied in said answer are untrue in substance and in fact of his own knowledge, except as to the matters and things which are denied in said answer upon information and belief, and as to such matters he believes them to be untrue; That the matters and things alleged in said answer are true in substance and in fact of his own knowledge, except as to those matters and things therein alleged upon information and belief,

and to such matters and things he believes the same to be true.

CHARLES A. FIRTH.

Subscribed and sworn to before me this 23rd day of August, 1939 by Charles A. Firth.

[Seal]

M. W. JOHNSTON,
Notary Public.

My Commission expires August 7, 1940.

[Endorsed]: Receipt of a copy of answer of Water Commissioner is hereby admitted this 24th day of August, 1939. Bilby & Shoenhair. By: L. Beyer. Knapp, Boyle & Thompson M.C. [220]

[Endorsed]: Filed Aug. 24, 1939. [221]

[Title of District Court.]

May 1939 Term

At Tucson

EXCERPT OF MINUTE ENTRY OF
MONDAY, SEPTEMBER 25, 1939
(Globe Division)

Honorable Albert M. Sames, United States District Judge, presiding.

[Title of Cause.]

This case comes on regularly at this time for arguments of counsel as to issues to be determined on the Petition to Review Action of Water Commissioner and the interpretation of the decree en-

tered herein on June 29, 1935 in connection therewith.

Frank E. Flynn, Esquire, United States Attorney, appears for the Government, and on motion of the said United States Attorney,

It is ordered that Geraint Humphreys, Esquire, Chief Field Counsel, Indian Field Service, be admitted to practice in this Court specially in these proceedings.

Charles H. Reed, Esquire, appears as counsel for the San Carlos Irrigation District.

John C. Gung'l, Esquire, appears as counsel for the Gila Water Commissioner.

Ralph W. Bilby, Esquire, and B. G. Thompson, Esquire, appear as counsel for the petitioners to review action of the Water Commissioner, and

It is ordered that Guy Anderson, Esquire, be entered as associate counsel for petitioners for review.

It is ordered that the answer of the Water Commissioner as a party to the proceedings on the petition to review action of Water Commissioner be stricken.

On stipulation of respective counsel,

It is ordered that the said United States Attorney be allowed to adopt as a part of the Government's answer to the petition for review the answer of the Water Commissioner heretofore filed herein. [222]

Argument is now had by respective counsel as to the issues to be determined on the petition for

review and the interpretation of the Decree in connection therewith.

And thereupon at the hour of 12:00 o'clock noon further proceedings herein are ordered continued to the hour of 1:30 o'clock p.m. this date, to which time respective counsel are excused.

Subsequently at the hour of 1:30 o'clock p.m., all counsel are present and further proceedings are had as follows:

Further argument is now had by respective counsel as to the issues to be determined on the petition for review and the interpretation of the Decree in connection therewith, and

The matter of the interpretation of the Decree herein is now submitted and by the Court taken under advisement, and

It is ordered that counsel for the petitioners for review be allowed ten days within which to file their brief on the interpretation of the Decree and that the United States Attorney be allowed ten days thereafter within which to file the Government's authorities in opposition thereto.” [223]

[Title of District Court and Cause.]

ORDER ON PETITION TO REVIEW ACTION
OF WATER COMMISSIONER.

The Court having heretofore considered the issues raised by the Petition to Review Action of Water Commissioner, heretofore filed by the Gila Valley

Irrigation District and other defendants in the above entitled cause, and the Court, having reviewed the action of said Water Commissioner in respect of the matters complained of and being fully advised in the law and the premises, does hereby find and conclude:

I.

That the provisions of the Decree heretofore entered in the above entitled cause relating to "stored water" are clear and unambiguous.

II.

That "stored water", as referred to in said decree and to be considered by the Water Commissioner in making apportionments to the upper valley users in disregard of the priorities of the lower users, as priorities are defined in Articles V, VI, and VII of said decree, means any water in the San Carlos Reservoir, impounded therein and available for discharge to the lower users, although such water accumulates through failure of the lower users to draw on the natural flow of the stream to the extent of their priorities; "accessions thereto" are all the waters flowing into said Reservoir in excess of the amount discharged therefrom [227] at the time of such inflow allowance being made for loss through evaporation and seepage; and "draft on stored water" is any discharge of water from said reservoir in excess of the amount of water flowing into the same at the time of such

discharge, or any release therefrom, at the will of the plaintiff, in excess of the amount of water necessary to irrigate eighty thousand acres of land, as prescribed in said decree.

III.

That said decree does not mean, nor does it provide, as is contended by petitioners, that after making the first apportionment in January of each year, the Water Commissioner, upon making additional apportionment to said Upper Valley Users during the period of said year, should take into account and apportion an additional amount of water equal to all water flowing into said Reservoir since the date of the last apportionment, less an estimated allowance for seepage and evaporation and less the amount of water which, by the terms of said decree, must be delivered to Kennecott Copper Corporation, Joseph J. Anderson, Grady L. Herring and T. H. B. Glasspie.

IV.

That the manner in which the Water Commissioner is now, and has heretofore been, apportioning stored waters is correctly set forth in plaintiff's answer to said petition and is in accordance with the provisions of said decree.

V.

That petitioners are not, and have not been, aggrieved by the actions of the Water Commissioner

in making apportionments of "stored water", and that no order should be made compelling the Water Commissioner to make apportionments of [228] water in the manner requested in said petition.

Wherefore, it is hereby ordered, that the prayer of petitioners for an order instructing the Water Commissioner to make apportionments of water to said petitioners and to the users of water within said districts, as in said petition requested, be, and the same is hereby denied.

Done in open court this 22nd day of January, 1940.

ALBERT M. SAMES,
District Judge.

[Endorsed]: Filed Jan. 22, 1940. [229]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Gila Valley Irrigation District; Franklin Irrigation District; Roy A. Layton; Milton Lines; William Waldrom; Roy D. Williams, and J. D. Wilkins, defendants above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the Order on Petition to Review Action of Water Commissioner rendered in the above-entitled District Court in the

above-entitled cause on the 22nd day of January, 1940.

Signed: RALPH W. BILBY
T. K. SHOENHAIR
JAS P. BOYLE
C. T. KNAPP
B. G. THOMPSON
Attorneys for Appellants,
Valley National Building,
Tucson, Arizona.

[Endorsed]: Filed Mar. 14, 1940. [230]

[Title of District Court and Cause.]

STIPULATION

It is herein and hereby stipulated by and between counsel for plaintiff and defendants, that in making up the designation of parts of contents of record on appeal and record on appeal the Clerk of the United States District Court, for the District of Arizona, shall certify a copy of the decree entered herein June 29, 1935, including the stipulation for consent to the entry of said decree, as printed by the United States Government Printing Office in 1935 (as shown on the last page thereof), along with the record.

It is further stipulated that the defendants herein shall furnish to the Clerk of the United States District Court a copy of said printed decree and

stipulation, to be certified by said Clerk, and will also furnish to said Clerk four other copies of said decree and stipulation, which need not be certified.

It is further stipulated that the said printed decree and stipulation shall not be printed as a part of the record in this case, but that said decree and stipulation may be considered by the Court as a part of the record in this case for the purpose of appeal, and all the parts of said decree and stipulation which shall be referred to in the briefs shall be published in the [235] appendix to such briefs.

Dated April 6th, 1940.

KNAPP, BOYLE & THOMPSON,

B. G. THOMPSON,

ARTHUR HENDERSON,

910 Valley National Building,

Tucson, Arizona.

BILBY & SHOENHAIR,

RALPH W. BILBY,

610 Valley National Building,

Tucson, Arizona,

Attorneys for Defendants.

FRANK E. FLYNN,

United States Attorney,

204 U. S. Court House.

H. S. McCLUSKEY,

Special Attorney,

Ellis Building,

Phoenix, Arizona,

Attorneys for Plaintiff.

Approved: April 18th, 1940.

ALBERT M. SAMES,
Judge of the District Court.

[Endorsed]: Filed Apr. 15, 1940. [236]

In the United States District Court for the District
of Arizona

United States of America,
District of Arizona—ss.

I, Edward W. Scruggs, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of United States of America, Plaintiff, versus Gila Valley Irrigation District, et al, Defendants, numbered E-59-Globe, on the docket of said Court.

I further certify that the enclosed Decree entered June 29, 1935, being section one of the transcript of record and containing pages thereof numbered 1 to 123, inclusive, together with the enclosed Reporter's Transcript of Proceedings of Monday, January 22, 1940, being section two of the transcript of record and containing pages thereof numbered 124 to 202, inclusive, and the attached pages numbered 203 to 237, inclusive, being section three of the transcript of record, contain a full, true and correct transcript of the proceedings of said

cause and all papers filed therein, together with the endorsements of filing thereon, called for in appellants' designation of the portions of the record, proceedings and evidence to be contained in the record and in the stipulation designating the contents of the record filed in said cause and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk, in the City of Tucson, State and District aforesaid.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of \$102.50 and that said sum has been paid to me by counsel for the appellants.

Witness my hand and the seal of said Court this 20th day of May, 1940.

[Seal]

EDWARD W. SCRUGGS,
Clerk.

[Title of District Court and Cause.]

TESTIMONY

Be it remembered, that the hearing of the above entitled matter having heretofore been set by the Court, for hearing before the Court without a jury, for this time, ten o'clock a.m., Monday, January 22nd, 1940, comes now the United States by Frank E. Flynn, Esq., United States District Attorney, and by Geraint Humpherys, Chief Field Counsel, Indian Irrigation Service; comes C. A. Firth, Wa-

ter Commissioner under the Decree, by John C. Gung'l, Esq., and the defendants by their counsel, B. G. Thompson, Esq., of Knapp, Boyle & Thompson, and Ralph W. Bilby, Esq., of Bilby & Schoenhair, and all parties announcing themselves ready, the following proceedings were had:

The Court: Gentlemen, this was the time fixed for the tendering of the testimony that either of the parties desire to offer to the Court on the petition, before the final order is entered on the petition for a review of the Water Commissioner. Are you ready to proceed, Gentlemen?

Mr. Thompson: We are ready, your Honor. [125]

The Court: The Government is ready?

Mr. Flynn: Yes, your Honor.

The Court: Very well, proceed.

Mr. Thompson: We would like to proffer testimony taken at a former hearing, your Honor.

Mr. Bilby: I might state, your Honor, that that testimony was taken in the presence of Government representatives and that they have copies of it, so they are apprised of what it is. I think it would save a lot of time.

Mr. Flynn: As I understand it, it is merely an offer, and of course we would like to have the record show our objections to it, on the ground that it is immaterial and irrelevant. Of course, without knowing what it is, I am not familiar with the testimony, and there may be many grounds on which it is objectionable in addition to the fact that it is not admissible for the purpose of varying or de-

termining the judgment and decree of this Court, that is, that the judgment of this Court is clear and plain and therefore any oral testimony or any testimony whatsoever would be inadmissible to explain or change it for the purpose of interpreting the decree. That is our objection. Now, as we say, it might be immaterial for other reasons, but even if the testimony were admissible for that purpose, this testimony probably would be objectionable on the ground it would not help to determine the decree of this Court, which is not ambiguous, so we would like to reserve [126] all these objections and exceptions to the offer, and it is my understanding that it is made for the purpose of the record, and we have no objection to it being made in this way. Of course, if admitted in evidence, we would object because we would want an opportunity of cross-examination.

The Court: I understand your tender is merely for the purpose of making the testimony available in that form, if admitted by the Court?

Mr. Thompson: That is correct, your Honor.

The Court: Merely as a matter of tender?

Mr. Thompson: Your Honor, we understand the Court has already ruled and necessarily found that the contract is unambiguous, and the Court said we would have a right to offer testimony and we would want to make our offer of proof just for the purpose of the record.

The Court: That tender is sufficiently clear for your purposes for the record, Gentlemen?

Mr. Thompson: Well, I think that we would like to have this marked and then we will refer to the specific pages, some of which was just conversation, which, as you will recall, Mr. Humpherys, had no part in the testimony.

(The Document was marked by the Clerk Petitioners' Exhibit No. 1 for identification.)

Mr. Thompson: Referring now to the Petitioners' Exhibit Number One for Identification, your Honor, we want to [127] offer, to make an offer to prove certain facts, and in that connection offer to prove that if Mr. John L. Gust, attorney-at-law of Phoenix, Arizona, if he were sworn and propounded these questions, which appear on page 11 to and including part of page 42, that he would make substantially the same answers in response to the questions there set forth, and I presume that, for the purpose of the record, that the reporter would merely copy from this instrument for identification the questions that appear here and the answers made by Mr. Gust. Is that satisfactory to the Court and counsel?

Mr. Flynn: I think so; that is all right.

The Court: And copied into the record, if copied in, as your offer of proof?

Mr. Bilby: That if these questions were asked, he would make these answers, your Honor.

Mr. Flynn: And the record will show our objections to each of those offers upon each of the grounds which I have just stated?

Mr. Thompson: It is our understanding.

The Court: Very well.

(Following is the examination of John L. Gust from Petitioners' Exhibit No. 1 for identification):

"Examination of
JOHN L. GUST

By Mr. Bilby:

Q. Your name is John L. Gust?

A. Yes.

Q. You are an attorney practicing in Phoenix? A. Yes. [128]

Q. And have been for a good many years?

A. About thirty years.

Q. You were practicing here prior to 1924 when the San Carlos Act was passed?

A. That is correct.

Q. Sometime about that time or prior thereto you were engaged as attorney for the Upper Valley Irrigation District, that is, the Gila Valley Irrigation District around Safford?

A. Yes, about that time.

Q. And continued to represent them for a number of years, did you not? A. Yes.

Q. During the period covering the formation of this decree?

A. Yes, and for some time afterwards.

Q. And were attorney of record for them in the suit that was filed to determine priorities on the river? A. I was.

(Testimony of John L. Gust.)

Q. That is the suit out of which this decree arose?

A. Yes. I may say during the hearing or taking of testimony that was taken in that suit I was not personally present but a member of my firm was and on all other matters I think I personally participated.

Q. You were conversant with what was going on in the hearings all the time?

A. I was.

Q. The purpose of that suit was to determine priorities primarily? [129]

A. It was to determine river rights. I don't know whether to say it would determine priorities would cover the whole thing or not.

Q. That was one purpose? A. Yes.

Q. After the suit was instituted the matter of taking testimony in order to determine water rights was referred to a master? A. It was.

Q. And considerable testimony was taken?

A. Yes, considerable, although the case was by no means anywhere near completed as far as the taking of the testimony was concerned.

Q. You kept in touch with these proceedings through a representative of your office?

A. Yes, Mr. Divelbess of our firm attended every hearing.

Q. And knew in substance what the testimony had shown? A. Yes.

(Testimony of John L. Gust.)

Q. After those hearings had been going on for some time and the evidence of the respective parties had been introduced was there a conference regarding this matter held in the office of the Secretary of the Interior in Washington?

A. I don't know whether you would call it a conference; there was a hearing before the Secretary of the Interior.

Q. Do you recall about when that was?

A. I can't give the exact date but it is of record here [130] somewhere. It was in December, 1930.

Q. Did you attend that? A. I did.

Q. Anyone else representing the Upper Valley land owners?

A. Mr. Walter Ellsworth, an engineer, representing them.

Q. Mr. Lynch was not there?

A. No, Mr. Lynch was not there.

Q. Who else was at the conference as near as you can recall? A. Mr. Truesdale was there.

Q. Representing whom?

A. At that time I don't suppose he had the same position, but he was very much in the same position that Mr. Humpherys occupied later. He was representing the San Carlos Indians and white people also on behalf of the Government.

Q. Who else?

A. There were a number of people there, I don't recall now who actually were present at that hear-

(Testimony of John L. Gust.)
ing except I know the Secretary of the Interior was there.

Q. It was held before him?

A. It was held before the Secretary in person, yes.

Q. Was the solicitor Mr. Finney there?

A. I have no present recollection that Mr. Finney was there at the time. He participated in the matter later and I believe he was present during the hearing although perhaps he didn't say anything.

Q. Can you recall whether there were any other representatives of the government besides Mr. Truesdale and Mr. Finney and the Secretary? [131]

A. I couldn't recall now. There were a number of people there.

Q. Can you state for the record what the purpose of that conference was and what came out of it?

A. Yes. For several years prior to that time the Upper Valley people whom we represented had been trying to make a settlement of this law suit and those negotiations had been made with Mr. Truesdale as representing the government,—sometimes there would be others who participated and sometimes to a certain extent the San Carlos District representing the white owners would participate, but the discussion was almost exclusively with Mr. Truesdale although we would have conferences here in Phoenix with representatives of all persons

(Testimony of John L. Gust.)

present. We were not able to agree and I think I should state what the point at issue was. The government claimed quite a large appropriation for the Indians.

Q. Do you recall approximately how much?

A. I think they claimed—I think in this final decree they were allowed about all they claimed. It is somewhere around close to fifty thousand acres, I guess. We felt that as far as appropriation was concerned they had only a very small acreage but they made the contention that the creation of the reservoir itself was a reservation from appropriation of sufficient water to irrigate the Indian lands. Of course they had some authority for that position. We didn't agree with that [132] contention. We further maintained that the passage of the San Carlos Act under the circumstances and the terms under which it was passed was a recognition of the rights of the Upper Valley people as they then existed and we endeavored from the beginning to secure for the Upper Valley people the right to continue to use the acreage that they had brought into cultivation in the way in which they had been accustomed to irrigate it. In other words, the people up there felt very strenuously since the government had allowed them to go up there and take up these lands under the homestead and desert land acts and establish their homes there that the government ought not to contend that the water that they had used for that purpose was illeg-

(Testimony of John L. Gust.)

ally taken. I remember Mr. McGrath made a very eloquent speech on that subject at one time which I wish had been preserved, but it wasn't. We of course knew that our position in that respect was not above attack by reason of certain decisions. However, we hoped if the case was tried, to prevail on our contention and we felt more strongly we could prevail on the question by the fact that Congress recognized these rights and didn't intend to destroy these rights by the passage of the San Carlos Act, in that they provided for the building of the San Carlos Reservoir in order to make good to the Indians in the shape of stored water, whatever natural flow rights they had had at an earlier date and which had not been maintained for them by the government. [133] So in all of our negotiations with Mr. Truesdale that was the question, as to how we could secure for the upper people by way of settlement the right to continue cultivating their lands as they had theretofore been cultivating, and while he at times acknowledged the justness of our position we were never able to agree upon any method by which that might be accomplished. Any suggestions which were made by him we didn't feel were adequate.

Q. You are speaking of suggestions made prior to the conference before the Secretary?

A. I am speaking about suggestions made prior to the conference, and I say furthermore if I understand Mr. Firth correctly as to the way he is

(Testimony of John L. Gust.)

now computing this water, that was what Mr. Truesdale was arguing for at that time prior to the hearing in Washington and to which we would not subscribe.

Q. Pardon me for interrupting you, may I ask at this time would Mr. Firth's manner of interpreting the decree give to the Upper Valley water users the right to use the water as they always had prior to the passage of the San Carlos Act?

A. Well, it is obvious that under some conditions it would not. Whether those conditions when they exist and when they do not exist, I do not know, that would be a matter of computation for the engineers, but under some conditions certainly would not. I think that hearing in [134] Washington before Secretary Wilbur was arranged for through Mr. Ellsworth, at least the first I knew of it Mr. Ellsworth asked me to go back to Washington with Mr. Elliott, and attend a hearing there and we went. We didn't have a very long hearing before the Secretary but we stated in substance our position, that here were these lands out here, these people had built their homes with the acquiescence of the government on the reliance of these water rights; here was the San Carlos Act passed and we didn't believe that that act intended to take away what these people had built up there and we thought an agreement could be worked out if the Secretary would indicate that that was his desire that that be done. Promptly upon the conclusion of the hear-

(Testimony of John L. Gust.)

ing, without any consideration, he suggested to us that he thought that should be done and suggested that we have a meeting right then and there with his assistant and see if something couldn't be arranged. We withdrew from the hearing and that day or the next day or maybe a couple of days, Mr. Truesdale, myself, Mr. Elliott and Mr. Finney and I think there were probably a couple of others on behalf of the government, discussed this situation and we tried to carry out the Secretary's suggestion and a letter was written by Mr. Finney stating the conclusions,—I think you have that and I think it should be produced here.

Q. I will ask you to examine this and state whether or not this is a copy of the letter which Mr. Finney wrote? [135]

A. Yes, it is. This is not the original, I don't know where the original is. I had a copy, not a signed copy. That came from my file.

Q. This is what was furnished you through the mail by Mr. Finney, your copy that was sent you?

A. No, I think I brought it with me from Washington. It was given to me there as a copy I got from Mr. Finney. The original letter was obtained and signed by the Secretary.

Q. The original showed the approval of the Secretary as this copy does?

A. Yes, the original was signed by the Secretary.

(Testimony of John L. Gust.)

Mr. Bilby: We want this marked as part of the record.

(Document marked Exhibit No. 2.)

Q. Mr. Gust, I suppose that no doubt Mr. Truesdale was furnished a copy of this too?

A. Yes, he received a copy right then and there.

Q. After that conference and after receiving this letter you came on back and I suppose resumed negotiations out here?

A. Yes, I came back with Mr. Elliott and I think it was early in the following year Mr. Truesdale came here. We got all the people together and had a discussion over here in the Federal Building concerning the situation. Mr. Truesdale in trying to carry out the suggestion of the Secretary had materially changed his attitude in regard to the extent to which he was willing to go to [136] effect a settlement.

Q. In your subsequent negotiations your effort was to carry out what the Secretary had suggested here, is that correct?

A. Yes, absolutely.

Q. And particularly in regard to the first paragraph here "that the water users in the Safford and other irrigation districts in Arizona and New Mexico above the San Carlos Dam should be protected insofar as their lands placed under irrigation and agricultural use prior to the date of the San Carlos Act of 1924 or such other date as may be agreed upon are concerned"?

(Testimony of John L. Gust.)

A. There is no question from that date on Mr. Truesdale, representing the government, tried in absolute good faith, to carry out that direction and that was the thing we were all aiming at.

Q. Did he give you a memorandum of the suggested paragraph in the decree to carry out this suggestion?

A. He gave me more than one, I think. Have you one there?

Q. I have one which you gave me from your file. I would like you to examine it and state whether or not you received this from him?

A. Yes, I think this is a memorandum that was probably presented at the meeting that we had early in January or February after we had that hearing in Washington, or it may have been presented to me personally and not at the hearing; it may have been written up afterwards. [137]

Q. By whom?

A. By Mr. Truesdale. That was not the first time this proposition of substituted storage had been discussed; that had been discussed long prior to this hearing but this is the first time it was put in this form. I am assuming now that this was the particular form that was put up at that hearing or about that time and I think it was. Some form was put up at that time and I think that is the one.

Q. You gave me this from your file?

A. Yes.

(Testimony of John L. Gust.)

Q. You are sure that this is one at least that you received from Mr. Truesdale?

A. Absolutely sure of that, yes, sir.

Q. Of course there were a great many conferences after this meeting with the Secretary in an attempt to formulate a decree that would carry out his suggestion, is that right?

A. Yes. What happened about that time was after we had had that general meeting here and we seemed to agree upon the principle of the thing, why then it was left to the engineers to work out the schedules; that was Mr. Elliott and I think a Mr. Ward representing the government and they worked a very long time, so long that I remember some of our clients thought they were working too long. However, the job was really quite a job to work out those schedules and while that was going on a formal decree was written up. [138]

Q. Who did that?

A. Mr. Truesdale, and that decree I find left blank this paragraph 8—if you want it you may have it—(handing document to Mr. Bilby). It is pretty much the same as it was finally worked out but paragraph 8 was not inserted in that. It left that to a little later consideration.

Mr. Bilby: Will you mark this Exhibit 3?

(Document referred to marked Exhibit No. 3.)

Mr. Bilby: Exhibit No. 3 is the document which Mr. Gust stated was given to him by Mr. Trues-

(Testimony of John L. Gust.)

dale as a suggestion for the part of the decree covering this question.

Mr. Gust: There should go with that another paper I have here that was handed me also by Mr. Truesdale that made suggestions in general for this paragraph No. 8. However, that is not yet the form in which it was written up. I haven't told you this but in making a search last night I found where this form that we have in the decree originated.

Q. Where did it originate?

A. At a later date it was prepared by Mr. Truesdale and handed to me and I think—there may be some very slight changes, but on this point, except for the fact that the date of the year that the original apportionment was to be made was changed from October to January I think this is the language I have here now as it was written by [139] Mr. Truesdale and as it was accepted by me and finally by Mr. Lynch and by our clients.

Q. Mr. Lynch made the suggestion, did he not, for the change of the date of apportionment? It was originally suggested that it be October first and he suggested that it be changed to January first?

A. No, I think Mr. Elliott made that suggestion; Mr. Ellsworth had something to do about it. Mr. Lynch made the suggestion it be changed to February first and from that suggestion it was decided to make it January first.

Q. A good part of these discussions, and there must have been lots of them, and conferences re-

(Testimony of John L. Gust.)

volved around the matter of handling these stored waters so as to permit the Upper Valley users to enjoy the same rights as they were enjoying prior to and at 1924, is that correct? That was a good part of your discussion?

A. Well, I don't know whether I can say that or not, after that hearing in Washington. We had been discussing that before that hearing and got nowhere. After that hearing in Washington when we came back here and had our meeting it was sort of understood that it was a question of wording it but it was going to be worked out in accordance with the Secretary's instructions so to speak. Perhaps most of that discussion was between myself and Mr. Truesdale.

I think maybe I ought to say something about the [140] problem as I understood it. Mr. Truesdale asked us to concede a prior appropriation to all the rights that the Indians were claiming. As far as the white lands were concerned there was no controversy because there was a decree in the Florence-Casa Grande Project and there was a decree of priorities in the upper project and while the two hadn't been tried out together we accepted them except that there might be a piece of land or two involved; in general there was no question there as to the date of appropriation. But as to the Indian lands we felt of course that these Indians were not entitled to a priority for any such amount as they were claiming. But Mr. Truesdale was very

(Testimony of John L. Gust.)

anxious to make that finding in the decree for the reason that he wanted to maintain the position he had taken and I think the government was then taking and perhaps is taking still based on the old Winters case that the creation of the reservoir gave them a prior right and that is something that they want to strengthen every way they could and we were willing that they could strengthen it as long as it didn't hurt us. We talked on the basis of letting them have what they claimed there, providing in some way they could protect us against it and Mr. Truesdale's idea was that the way to do so was substituted storage and from that time, that is, from the beginning up to the date when that was written up in its final form a part of that plan was to pay something for that substituted storage right. Several [141] amounts per acre were discussed but that was finally eliminated because after we agreed upon the form in which this was to be put in I think our clients talked Mr. Truesdale out of it, I didn't,—I think Mr. Ellsworth or Mr. Wilson did, but this time we were getting some right there for which we were paying or would pay.

Q. Was that the basis upon which you conceded the prior rights to this excessive amount of land for the Indians?

A. Yes, what we figured out was this, that there were four limitations to be placed upon the use of water on the upper valleys: One was the fact that the limitation of the amount of water in the river.

(Testimony of John L. Gust.)

The upper people couldn't get any water unless it was flowing in the river at the time when they desired to use it, which was the greatest limitation of all. The next was six acre feet per annum of consumptive use. The next was 120,000 acre feet per year for the projects. Then the fourth was this one and Mr. Elliott and I figured on this thing a long time, that this one was not to come into operation because the others were sufficient for all the purposes of the lower project. Of course on the basis of the figures from past records the work was done by Mr. Elliott, I was not able to do that computation, but he did make that computation and had some figures and while I didn't attempt to study his figures in detail he assured me except in an entirely unprecedented condition, which had never existed as far as the records disclosed, that this [142] situation whereby the reservoir would go dry and water be distributed according to priorities, something that wouldn't happen, on the basis of the past records and that is what was represented to our clients, I am sure; I know I told them that and I know Mr. Elliott told them that. That is the thing we tried to get there because we figured that the water in the river,—we couldn't take it except when it was available, we were limited to six acre feet consumptive use and 120,000 acre feet per annum, that those alone would accomplish what the Secretary had promised us and asked us to concede and this other was only a propo-

(Testimony of John L. Gust.)

sition of upsetting the allowances, overcoming the allowances to the Indians of the full appropriation which they claimed.

Q. In other words you conceded a priority for a great many more acres of Indian lands than you would have otherwise conceded had you not gotten the concession that the Secretary of the Interior gave you?

A. Yes. They had no evidence in there. I think they had some evidence in there probably of about 20,000 acres of Indian lands that had been irrigated. As a matter of fact the way they got that evidence they had somebody in the early days that went over the ground and saw the land that had been irrigated for sometime, but we who live in the West know how these Indians irrigate. They irrigate one patch and then the next. These early settlers said that the Indians irrigated all the land that had been [143] irrigated. We knew that wasn't true. We figured that they hadn't irrigated more than five thousand acres at the most although every one connected with the Indian Department will tell you it was more than that but the reason they get that is from the old records, they irrigate one piece this year and another piece the next and then add them together. We figured they might get possibly 15,000 acres but we never figured a larger appropriation than that, based on actual use.

Q. Then why did you concede 37,000?

(Testimony of John L. Gust.)

A. As I said before we conceded that in return for the proposition of substituted storage so we figured that that proposition would never come into operation. I want to make a modification of that last, we always discussed that of course it might be possible that there might be some dry period greater than ever occurred when possibly there might be some extreme case when it would come into operation but as far as the records in the past were concerned it would not.

Q. In other words, you figured the decree as consented to by you was such that the Secretary's direction would be carried out in that your clients would not be disturbed in the use of the water in the same manner as they had used it before?

A. That is correct.

Q. In working on the drafting of the decree or in criticizing and going over the drafts that had been prepared [144] and presented to you by Mr. Truesdale and in finally agreeing to the form of the decree that was adopted did you consider that you had accomplished what the Secretary had directed in his letter?

A. If I hadn't I would not have approved it.

Q. In these conferences I assume both before and possibly after the meeting with the Secretary of the Interior was there advanced this idea of a reservoir off to the side fed by a feeder canal? Are you familiar with that theory?

(Testimony of John L. Gust.)

A. It was not at any time prior to the time that we had agreed upon the form of the decree. This form of decree which I gave you there, when it was first written up, which I said was accepted by me, was presented by Mr. Truesdale I think early in 1933 I believe and it was presented by him to me and I took it under consideration and he pointed out to me at that time that that language in the decree would do what I had been asking him to do which was this: That we would get by way of this substituted storage proposition as far as it was concerned one half of the water that they got for their eighty thousand acre project and if they increased the project over eighty thousand acres we were not concerned with that. I will explain that in this way, at the beginning of the year the amount of water that was stored there above the dead-line, some certain amount of water that they can never take out as I understand it, but the amount that was available for use was to be divided fifty-fifty, we [145] were to be allowed half of that and they the other half so to speak. We didn't get that half out of the river but we got water out of the river equal to half of it. Then whenever we made an apportionment or whenever an apportionment was made at a later date it was made on the same basis. That was of course all the water that flowed into the reservoir except it went to some outside user. Of course there were outside users that were known. Mr. Truesdale suggested that there might be out-

(Testimony of John L. Gust.)

side users that were not known, for instance, Buck-eye was mentioned as might come up as it had I think,—maybe it had a suit pending at that time or was threatening one, making some claims for water. He said "Of course we can't take any of this substituted storage proposition, this is water we have to let go through the reservoir to other people", and we said, "Of course not, but we want all the water that goes into the reservoir to be taken into consideration", and we had a discussion over the form of the decree or partial form of the decree on this particular proposition as to whether that would accomplish it or not. I finally came to the conclusion that it would and it was put up to Mr. Lynch and he pondered over it for a while. Mr. Lynch finally approved it. Now I wrote a letter—

Q. I was going to get to that. When the decree was drafted and accepted and signed you considered that it had accomplished that result that you were seeking? [146]

A. Yes, I have a letter here in which I said that. On June 28, 1933 I wrote a letter to Mr. Wilson, then Secretary of the Gila Valley Irrigation District in the concluding sentence of which I made the statement "that inasmuch as there will be additional apportionment every 30 days if there is any additional water" it wouldn't make any difference as to what time of the year we made the original apportionment. That could only be made upon the basis of the opinion that I later wrote. I should

(Testimony of John L. Gust.)

show Mr. Firth as early as June 28, 1933, that I was of the same opinion that I afterwards expressed in my opinion to him.

Q. After the decree was put into effect and Mr. Firth was appointed as commissioner you were later advised of the interpretation he had put on that portion of it relating to stored waters and the manner in which he calculated his apportionments that were made to the upper valleys, were you not?

A. Yes, but I think before that time he had come over and talked to me about it and we didn't understand each other, we didn't get anywhere apparently.

Q. Did you agree with his version or interpretation? A. No, I didn't.

Q. Was his interpretation in accordance with your understanding of what the decree had contained and was to contain? A. No.

Q. Did you write an opinion covering what you thought [147] the decree meant?

A. Somebody sent me three questions,—I think they had originated with Mr. Firth, I think he must have made them up, I didn't agree with any one of them, so I wrote an opinion. I think Mr. Wilson or Mr. Kimball or whoever was the secretary at that time said they would like to have an opinion for their board to consider so I took four or five days to write that letter which I did write, in which I set up at the end a method that I thought Mr. Firth ought to follow.

(Testimony of John L. Gust.)

Q. Will you examine this and state whether or not this is a copy of that opinion which you sent?

A. Yes, I examined this this morning with the copy in my office and it is a copy of the opinion that I wrote except that when I wrote it I sent a copy to Mr. Lynch and he called my attention to the fact that I had made an error, or in writing it up an error had been made, I had used the word "next" for "last" on the next to the last page and in checking it over with the decree I found another error in it in referring to the decree, I referred to Article 6 and it should have been Article 7.

Q. Did you correct those in that copy you have now, both of these errors?

A. Yes, they were corrected.

Mr. Bilby: I would like to have this marked for the record.

(Document marked as Exhibit No. 4.) [148]

Q. Mr. Gust, did that opinion express not only your idea of what the decree actually meant, what it said, but your idea and intention as to what it should mean when you agreed to it being signed?

A. Yes, it did.

Q. Did that portion of it, interpreted as you say it should be, in your opinion carry out the instructions or suggestions of the Secretary of the Interior?

A. To the best of my opinion it would. I think I should call attention to something in the decree here in Paragraph 8. The decree says that very

(Testimony of John L. Gust.)

thing that is intended to do that. I didn't mention it in that letter, maybe I should have but it is there.

Q. Will you read into the record that portion you have reference to?

A. This language I am about to read just precedes that portion of the decree which is under discussion. It reads as follows: "It being evidenced thereby that the earliest right of plaintiff is prior in time to all and every rights of said defendants and certain of plaintiff's other rights are prior in time to certain rights of said defendants. That, however, plaintiff and said defendants in recognition of the desirability of making it practicable for said defendants to carry on the irrigation of said upper valley lands to the extent to which the areas to which their said rights apply heretofore have been irrigated and so that said San Carlos Act [149] shall inure in part to their benefit and this suit may be compromised and settled, have agreed that the following provisions shall be and they are hereby embodied in this decree, which said provisions in turn and insofar as they affect the other parties in the case shall inure to the benefit of and be binding upon them, to-wit". Then follows this provision which is said to be put in for the purpose of accomplishing what I just read.

Q. And what the Secretary directed?

A. Yes.

(Testimony of John L. Gust.)

Q. In your instruction and intention as you have stated, after the original apportionment has been made at the first of the year then in making subsequent apportionments it was your thought and intention in consenting to the decree that the commissioner should take into account all waters that ran into the reservoir as shown by the gauging stations at Calva and Peridot less proper allowances for seepage and evaporation and the proper allowances for those named in the decree who were excepted from it, namely, Kennicott Copper Company and Anderson and two or three others and that he should add that to the amount that was in the reservoir at the time of the last apportionment without regard to whether or not an equivalent amount had been drawn out in the meantime?

A. If that equivalent amount was drawn out for the benefit of the Indians or white lands in the San Carlos Project that were provided for by this decree.

Q. In other words, to use an illustration, let's [150] assume that there was sufficient water in the reservoir at the beginning of the year, January first, to afford an apportionment of two acre feet to the Upper Valley defendants. Let's assume in the meantime for the period of another month before another apportionment was made a quantity of water runs into the reservoir sufficient to supply the needs of the lower valley to the extent of its eighty thousand acres entitled to be irrigated and

(Testimony of John L. Gust.)

that amount is taken out of the reservoir with the net result that its elevation is neither raised nor lowered. Under your theory we would be entitled to an apportionment of the amount that would have run in there in the meantime?

A. I don't think the raising or lowering of it has anything to do with it. If it did what is the use of making an allowance for the evaporation and seepage. The evaporation and seepage would be taken care of in the going down or going up and there wouldn't be any need for any provision in the decree to make such allowances. Another reason that we didn't want it that way and I don't think anybody wanted it that way, was this, that that would base the rights of the Upper Valley people upon the way in which the water was taken out and put a temptation on the lower people to cut down the supply up above. It would make it possible to do that to a certain extent.

Q. That phase of the discussion was pointed out?

A. It was discussed between Mr. Truesdale and myself.

Q. Before the decree was signed? [151]

A. I don't believe it was discussed after the hearing in Washington, it was before that time.

Q. This letter from the solicitor to the Secretary and approved by the Secretary is dated December 13, 1930. The decree was not actually signed until June 29, 1935. Was all that time consumed

(Testimony of John L. Gust.)

in arguing over the provisions of the decree or what caused that delay?

A. I suppose I will not be speaking out of turn when I say that the government proceeds with deliberation at all times and I think that was the reason principally. But I will say that the form of the decree was agreed upon I believe in the first half of 1933 but at all events in 1933 because I find in my files here a letter I wrote other people early in 1934 saying that the decree had been agreed upon and that the formal signing was deferred in the matter of working out certain details with respect to schedules and other matters of that kind and getting them all together to sign up.

Q. That caused a good part of that delay?

A. Yes.

Q. You are much more familiar with this matter than any of us, Mr. Gust, having represented these defendants for this period of time. Is there any statement you would like to make to clarify it?

A. There is one thing. You asked Mr. Firth here about the difference in the amount of water the upper people would have according to the method I gave him and the [152] method he followed and I think he said 34,000 acre feet. I don't believe that means water, I think that means theoretical water. I don't believe there is any such difference in actual fact because I don't believe the water would have been in the river to take it out. In other words,

(Testimony of John L. Gust.)

if he had used the method I suggested this substituted storage limitation wouldn't have come into operation this year and they wouldn't have gotten as much as 34,000 acre feet additional but they would have gotten some more than they have now and this limitation wouldn't have had any effect. Isn't that the situation?

Mr. Firth: Partially so. Naturally if they had this .8500 acre foot apportionment I wouldn't have had to close.

Q. Mr. Gust, you say it wouldn't make that much difference. It was about 86/100ths of an acre foot difference.

You say it wouldn't have made that much actual difference because at the time they wanted to take the water the water wasn't in the river?

A. I said I didn't believe it would. I am not an engineer but that is my idea. Because the water wasn't in the river they wouldn't have gotten part of it anyway.

Q. Isn't this a fact, if this method of apportionment had been in effect their apportionment earlier in the year when there was water to take would have been greater, hence they would have been justified in taking more water than they did. In other words, they wouldn't use up right [153] to the last bit of their apportionment and leave themselves without any water?

A. I am not able to figure out exactly how it would work only I understood Mr. Firth's figures

(Testimony of John L. Gust.)

to be the figures based on computation, not on actual operation.

Q. But it is a fact, is it not,—this may be argumentative, if they had an apportionment we will say at the beginning of the year of four acre feet they would be justified in using water when it was in the river a lot more frequently than if they had one acre foot? A. Provided they needed it.

Q. They would be conserving it, it would make a difference in that manner?

A. It would make a difference, no question about that. Another thing, the method that Mr. Firth uses here I don't think squares with any interpretation of this decree. There will have to be some readjustment of that somewhere because to my mind it doesn't fit any interpretation you can make. As I understand him he goes entirely by the lowering or raising of the water in the reservoir. If it doesn't go up there is no additional apportionment unless they take water out for acreage above the eighty thousand acres, which I suppose they are not doing. That would have to be, if it could be justified in any interpretation of the decree it couldn't be on the theory Mr. Firth has. It couldn't be justified on the theory, I don't think, by the reservoir being by the side, which it is not. [154] One time after we had agreed upon the form of the decree Mr. Truesdale wrote a letter in which he made that suggestion. I didn't understand what he

(Testimony of John L. Gust.)

meant by that letter and I didn't answer it but he came over and we discussed it and after a discussion with him I was satisfied he subscribed to what he had stated to me when he first presented this form, that this accomplished what I wanted. I don't know of anything else.

Q. State it a little more fully why you think there is nothing in the decree which would justify Mr. Firth. You think there is no language in the decree that authorizes the construction of that contract?

A. As a lawyer I do not. Mr. Firth is doing the same thing my engineering friends are always doing on me, they interpret the language different than the lawyers do.

By Mr. Humpherys:

Q. Mr. Gust, in 1935 in the fore part of April, along about the 15th I think, you as attorney for most of these defendants signed a stipulation which is embodied in the bound volume of the decree?

A. I did as attorney for all lands in the Gila Valley Irrigation District and some few, some small acreage outside I think, but practically it was confined to the lands in the Gila Valley Irrigation District. They had a method of communicating with the land owners up there and advised me this was satisfactory to the land owners and I signed it as attorney for them. [155]

(Testimony of John L. Gust.)

By Mr. Firth:

Q. How do you determine the quantity of water in the San Carlos Reservoir for your first apportionment?

A. I don't know what the condition is now. That may be the actual water in the reservoir above the deadline or it may be the theoretical water that should be there if they have taken any out above what is properly required for an eighty thousand acre project.

Q. Then on the first day of January, 1936 when I started the operation of this decree I had to make an apportionment? A. Yes.

Q. How would I determine what quantity of water was there?

A. You determine it by the quantity of water that is actually there, by elevation, yes.

Q. That elevation corresponds to a certain quantity of water by capacity curve or whatever you might have to determine it.

A. That is the quantity of water actually there. I don't know about your engineering methods, that is up to you. Maybe I ought to say one thing more. As I said I don't think Mr. Firth's method squares with it but the theory here evidently is that water that is taken out of the reservoir for the irrigation of these lands, Indian lands and white lands provided for by the decree is not stored water but is taken out in satisfaction of their prior appropriations that they were awarded in the decree. In my

(Testimony of John L. Gust.)

letter that I wrote in 1936 I pointed to two [156] provisions in the decree which I believe show that as long as there is water in the reservoir the rights of these lands provided for in the decree are satisfied out of stored water and not out of prior appropriations, and of course if those rights are satisfied out of stored water then I think the rest of it follows, that as water flows in you are adding to the stored water and water that is taken out is stored water and no water except that which may be allowed to go to lands outside passes by the reservoir as is set forth in the illustration; but if we did take that theory that the water that was taken out of the reservoir was water taken as far as it was permissible in the decree, was taken to supply the prior appropriations that were allowed by the decree, we couldn't take it all because it is not distributed that way. Some of that water goes to lands that haven't any appropriation in the San Carlos Project, a good deal of it, and no account is kept as to where it goes, and if you wanted to work this out on the theory that a lot of this water that passes through the reservoir is just simply passed through without becoming stored you would have to figure each individual piece of land to which it went to see whether it had an appropriation or not because obviously [157] water that goes to supply some land that came into the project very recently down below cannot be said to supply a prior appropriation. My view is that under the decree all the rights as

(Testimony of John L. Gust.)

long as they are stored water are supplied out of stored supply and if that is true the interpretation that I make of the decree naturally follows I think. If you took the other view you would have to change your method Mr. Firth is now following and determine each particular piece of land that the water went to to determine whether it might be considered water passing through or whether it ought to be supplied from stored water.

Mr. Bilby: In other words, some of the white lands in the San Carlos Project have rights that are junior to some of the Upper Valley rights?

Mr. Gust: They brought in some that had no water right at all.

Mr. Bilby: Many of them are junior to those up there?

Mr. Gust: Oh, yes, a great many.

(After recess)

Mr. Gust: I want to correct an error I made this morning. In speaking of the provision of the decree providing for substituted storage I said that it was a fifty-fifty proposition and I followed that up by stating that the people on the upper river were awarded half of the water that was in the reservoir. A fifty-fifty proposition is all right but the statement that it was [158] half was plainly erroneous because the decree provides that the people in the upper river shall set aside to them an equal amount to that which is in the reservoir. I just want to make that correction.

(Testimony of John L. Gust.)

Mr. Bilby: You said something about Mr. Elliott, after you had had a conference with the Secretary of the Interior and agreed upon this plan, Mr. Elliott went back over a period of years and compiled some figures to show the effect of putting this plan into effect on the Upper Valley. Will you tell us a little about that?

Mr. Gust: Yes, he had I think made a computation of the amount of water that had been shown by the old figures as the flow in the river each year and he had prior to that time made a computation of how much water there would be available and I think there had been a similar computation made by another engineer who was employed at one time. After we had this hearing in Washington and it looked as if we were getting down to something definite I told him we wanted to be sure on this thing and asked him to figure out just how this would operate on this basis and he did that and he also had at that time a graph, I guess you would call it, showing how it would operate.

Mr. Bilby: You saw that?

Mr. Gust: Yes, I saw that. I don't think I have it now but I saw that graph and it showed what I said this morning was my understanding of the way this worked; that [159] it wouldn't come into operation on the basis of the figures for past years.

Mr. Bilby: In other words, the only way under your theory that the prior rights of the various

parties as set up in the decree would come into operation would be for the reservoir to be dry.

Mr. Gust: Yes. This graph showed if we continued to have about the same kind of weather we had in the past the reservoir wouldn't go dry on the basis of an eighty thousand acre project.

(Mr. Gust excused)."

Mr. Thompson: Then, your Honor, we offer to prove that Mr. J. M. Wilson, of Safford, Arizona, if he were sworn to testify and propounded the questions which appear in Petitioners' Exhibit 1 for Identification, beginning at page 42 and including to page 52, that he would make substantially the same answers to the questions that appear on those pages; and that if Mr. William Ellsworth, of Safford, Arizona, were sworn and testified in this cause and were propounded the questions which appear on pages 53 to 57 of Petitioners' Exhibit 1 that he would make substantially the same answers as are made on those pages. So there won't be any misunderstanding, the reporter will copy this and incorporate them in our offer of proof. We don't ask that all be copied, but merely the questions and answers. There are some extraneous matters in it, so that will all be clear of that, your Honor. My understanding [160] is that only the questions and answers will be copied; of course, as in any record, that is, there are observations of the

attorneys or questions that were outside of the issues here, and we are only offering the actual questions propounded to Mr. Gust and his answers to the same, so that the reporter will be clear on it; there are not many things other than the questions and answers, but there are a few.

(Following is the examination of J. M. Wilson from Petitioners' Exhibit No. 1 for Identification:)

“Examination of

J. M. WILSON

By Mr. Bilby:

Q. Will you give your name please?

A. J. M. Wilson.

Q. You live at Safford? A. Yes.

Q. What is your business there?

A. Some farming business, principally cattle raising and feeding.

Q. Have you been engaged in farming there in the past? A. Yes, sir.

Q. For how long?

A. For 27 years at Safford.

Q. You have been getting your water out of the Gila River? A. Yes, sir.

Q. Do you hold any position with the Gila Valley Irrigation District?

A. Yes, sir, I was secretary to the board. [161]

Q. For how long?

A. From its first organization which as I recall was in 1923, until immediately after the consent decree was signed.

(Testimony of J. M. Wilson.)

Q. So you were secretary all during the years that negotiations concerning the decree were carried on? A. Yes.

Q. Did you participate in the conferences and meetings concerning it? A. Yes, sir.

Q. Carry on the correspondence about it?

A. Yes, sir.

Q. Receive correspondence from Mr. Gust and the engineers? A. Yes, sir.

Q. Did you attend any conferences at which government representatives were present?

A. Yes, sir.

Q. Without attempting to name a specific conference or definitely who was present at each conference, can you tell us some of the government representatives who were at some of the conferences?

A. Most of the time Mr. Truesdale was there. Various attorneys from the Los Angeles office, some that were located here like Captain Smith and Mr. Martin at the time of the hearing before the master and after that there was Mr. Ward. I recall Mr. Humpherys once or twice and Mr. Wathen.

Q. In those conferences who, besides yourself, were *represent-* [162] *the Upper Valley?*

A. I think in every instance there was one or more directors, usually it was Mr. Ellsworth and probably one or both of the other directors.

Q. What position did Mr. Ellsworth hold at that time?

(Testimony of J. M. Wilson.)

Q. If I remember correctly he has been president of the organization and still is.

Q. Was Mr. Gust there representing you as attorney? A. Yes, sir.

Q. And Mr. Lynch representing the Duncan Valley? A. Yes, sir.

Q. Was Mr. W. R. Elliott there in the capacity of an engineer? A. Yes, sir.

Q. Did you keep in close touch with the proceedings that were being had before the master prior to the conference you heard Mr. Gust tell about with the Secretary of the Interior?

A. The first few days we were there in attendance; after that we just received reports through Mr. Elliott and through Mr. Gust.

Q. Did those reports come to you as Secretary?

A. Yes, sir.

Q. You were advised of what was going on there? A. Yes, sir.

Q. And substantially what the testimony was?

A. Yes.

Q. Did you know about the conference that was held with [163] the Secretary of the Interior?

A. Yes, sir.

Q. Did you see the letter that the solicitor wrote to the Secretary and was approved by the Secretary, being Exhibit No. 2?

A. We were furnished a copy of it at the time.

Q. You had a copy of that as secretary?

A. Yes.

(Testimony of J. M. Wilson.)

Q. Prior to that time had the upper valleys been able to agree with the government representatives on any plan? No, sir.

Q. Was the plan outlined by the Secretary satisfactory to the upper valleys?

A. It was; I wouldn't say exactly satisfactory but we figured it was the best we could get and we could get by with it.

Q. You participated in the conference after that conference with the Secretary? A. Yes, sir.

Q. Was it your understanding that the decree that you were working on that was already signed was carrying out the instructions and suggestions of the Secretary?

A. Yes, sir, based on those instructions.

Q. Mr. Wilson, the decree provides and adjudicates that there is a prior right on behalf of some thirty-five or thirty-seven thousand acres of Indian lands that is ahead of anything in the upper valleys. Tell us how [164] it happened that that was in the decree. Did the Upper Valley people consent to that?

A. Until the time of the hearing and before we heard the evidence before the master we were of the opinion that they wouldn't be able to establish any such priorities. During that hearing we were convinced they could establish priorities to some acreage based on some opinion that our attorneys found had been upheld in like cases or similar cases. We therefore thought that if any priorities were

(Testimony of J. M. Wilson.)

granted to the Indians and they used the normal flow that it would take such a great quantity of water to reach them that it would put us so short up there that we wouldn't be able to proceed with our farming business, and, therefore, that some kind of a compromise must be reached.

Q. What did you understand you were getting in return for consenting that that great amount of acreage should have a prior right?

A. We figured we were getting just what the instructions that the Secretary handed down signed was given us. That is in round words we would be left alone as we were back in 1924.

Q. Was it in consideration of that that the water users and farmers up there consented to this adjudication of prior rights to the extent of 35,000 acres?

A. Yes, sir.

Q. Was that discussed at your meetings? [165]

A. Yes, sir.

Q. And discussed at meetings in which were the representatives of the government?

A. Yes, sir.

Q. Are you familiar with the interpretation that has been and is now being placed upon the decree with regard to stored waters and the apportionment of waters to the Upper Valley by the commissioner? A. Yes, sir.

Q. In any of these conferences did you ever hear any government representatives make the contention for any such instruction as that?

(Testimony of J. M. Wilson.)

A. No, sir.

Q. When was the first time that was ever brought to your attention?

A. After Mr. Firth was appointed water commissioner and he had made such an interpretation the word came to me that he was so interpreting it.

Q. What did you do?

A. I don't know whether I did it on my own accord or the board asked me to go to Mr. Firth and try to explain to him what the situation was, that it was being wrongfully interpreted.

Q. Did you go to him? A. Yes, sir.

Q. Did you explain your contention at that time?

A. Yes, as best I could. [166]

Q. I think you then requested Mr. Gust to give you an opinion on behalf of the board, didn't you?

A. We did.

Q. That is the opinion that has been made part of the record, being Exhibit No. 4?

A. Yes, sir, that is it.

Q. Did that opinion express the understanding of yourself and other members of the board as to the meaning of that decree? A. Yes, sir.

Q. Is that what you thought you were getting when the decree was entered? A. Yes, sir.

Q. Did you hear in some of the conferences that you attended a discussion or contention on the part of some of the government representatives as to this theoretical reservoir being off to the side and being fed by feeder canals? A. No, sir.

(Testimony of J. M. Wilson.)

Q. You didn't hear that advanced at any time?

A. No, sir.

Q. Did the upper valleys ever agree to any such theory? A. No, sir.

Q. You say you had never heard of it before?

A. No, sir.

Q. You say it was your understanding that this decree as it was finally rendered would carry out the suggestion and direction of the Secretary of the Interior in that [167] it would leave you in the same position as you were before the San Carlos Act was passed. You used water out of the river prior to that time? A. Yes, sir.

Q. Had there ever been any restriction as far as that valley as a whole was concerned about taking water out of the river prior to that time?

A. No, sir.

Q. There was no claim asserted as to your right to take it out?

A. Not as to the valley as a whole.

Q. Except as between yourselves?

A. We had a decree that took care of the situation as between the canals but nothing that limited them as a whole.

Q. Nothing that limited them insofar as the so-called San Carlos Project was concerned?

A. No.

Q. There had never been any restriction placed upon you from their standpoint or any claim made until the San Carlos Act was passed?

(Testimony of J. M. Wilson.)

A. They may have made some claims but no litigation about it.

Q. Or no attempt to enforce any claims?

A. No, sir.

Q. At that time it was the continued practice to take the water out of the river whenever there was water there to take? A. Yes.

Q. Speaking of the district as a whole? [168]

A. Yes, sir.

Q. Operating under the decree as it is now being interpreted by the commissioner are you permitted to take water out of the river whenever it is there as you were before? A. No, sir.

Q. You are limited in that respect?

A. We are limited.

Q. Are there times when there is water passing by there and you are not permitted to take it?

A. Yes, sir.

Q. Are you then being given the right to operate as the Secretary suggested that you were as before the San Carlos Act was passed? A. No, sir.

Q. You heard the statement this morning concerning the formula that Mr. Firth had worked out showing the difference that would result from applying his interpretation of the decree and applying that that Mr. Gust contended for, did you not?

A. I know of it, yes, sir.

Q. You know that in those figures by following the so-called Gust interpretation or the interpretation claimed by the Upper Valley water users you

(Testimony of J. M. Wilson.)

would have had an allotment of approximately 87/100ths of an acre foot more than you otherwise got? A. That is my understanding.

Q. For the current year of 1938?

A. Yes, sir.

Q. You heard some statements pro and con as to whether [169] or not the failure to get that apportionment actually resulted in the loss of any water to you. What is the effect in that connection? Will you explain to us?

A. It has at various times during this past summer resulted in us not being able to take water.

Q. Did it result in the loss of that amount of water or substantially that amount?

A. I think in most of it.

Q. Just resulted how?

A. Today there is water there at the heads of I believe all the canals. I think there are two or three canals which are not taking water now because their apportionment is practically used up. They may have a very very small apportionment left but they are not taking that water because the apportionment is so small that they had rather not plant the crops that they would ordinarily plant this time of year, but conserve what little apportionment they have left to take care of some crops they have already started.

Q. What is the practice with regard to taking water to the full extent of your allotment? Has it been the practice to use it all up?

(Testimony of J. M. Wilson.)

A. No, a good farmer wouldn't do that.

Q. Would he dare do it?

A. There might be times toward the end of the year that he might dare do it; any other time of the year, no, it wouldn't be good practice. He would rather let part [170] of his crop go in order to keep a little water to save the other portion of his crop a little later on.

Q. That is true because under the present manner of interpreting the decree you wouldn't get any more allotment unless sufficient water ran in to cause a rise in the level of the reservoir, is that right? A. Yes, sir.

Q. Have there been times during this current year when there was water in the river that you could have taken had you dared to do it with the small allotment that you had left?

A. There have been several times.

Q. But you didn't take it? A. That is right.

Q. Because as I understand you you didn't dare to use up your entire allotment, is that correct?

A. Yes, sir.

Q. Putting it this way, if you had a large allotment at the beginning of the year you would take out more water as you went along than you would with a small allotment? A. That is right.

Q. There is usually more water in the spring of the year than there is in the hot part of the summer, is there not? A. Yes, sir.

(Mr. Wilson excused)"

(Following is statement of William Ellsworth from Petitioner's Exhibit No. 1 for Identification:)

“Examination of

WILLIAM ELLSWORTH

By Mr. Bilby:

Q. Your name is William Ellsworth?

A. Yes, sir.

Q. You are a farmer in the Safford Valley?

A. Yes, sir.

Q. And have been all your life?

A. 52 years.

Q. During all that time you have been irrigating your lands with water from what source?

A. The Gila River.

Q. And you were so irrigating your lands long before they passed the San Carlos Act?

A. Yes, sir.

Q. You are president of the Gila Valley Irrigation District? A. Yes, sir.

Q. And have been since its organization continuously?

A. Yes, sir, I have been president and a member of the Board.

Q. Either president or member of the board at all times? A. Yes, sir.

Q. Were you president during a good part of the time that negotiations were being carried on concerning the framing of this consent decree?

A. Yes, sir.

(Testimony of William Ellsworth.)

Q. Did you participate in the conferences?

A. Most of them or some of them.

[172]

Q. Did you attend a conference in Washington with the Secretary of the Interior?

A. No, sir.

Q. Did you request Mr. Gust and Mr. Elliott to go on behalf of the Irrigation District?

A. Yes, sir.

Q. You had taken part in the negotiations that had been carried on before that time, had you not?

A. Yes, sir.

Q. And knew that you hadn't been able to agree with the government representatives?

A. That is right.

Q. Did you have something to do with arranging that conference? A. Yes, sir.

Q. You knew what the purpose of it was?

A. Yes, sir.

Q. Did you learn the result of it? Do you know what happened as a result of the conference?

A. Yes, we had a report of it when they came back.

Q. Was that reasonably satisfactory to the Upper Valley?

A. Yes, sir, very satisfactory.

Q. What in your mind was the big point coming out of that conference, what did it mean to you?

A. My thought was that we was going to get a settlement and get the same right to use water out of the river that we had always been having. [173]

(Testimony of William Ellsworth.)

Q. That is in accordance with the Secretary's statement? A. Yes, sir.

Q. In carrying on your negotiations or framing the decree after the Secretary had made that statement was that what you were driving at all the time?

A. Yes, sir.

Q. When the decree was finally prepared did you go over it and read it?

A. Yes, sir, we went over it and read it or heard it read.

Q. Was it entirely clear to you?

A. No, there was about half of it I never did understand.

Q. Upon whose advice did you rely as to what it meant?

A. I relied on our engineer and our attorney.

Q. What was their statement to you as to what it did represent in regard to whether or not you were getting what you thought you were getting, namely, the right to use the water that you had theretofore used? Did they represent that it did so advise? A. Yes, sir.

Q. Was that your understanding of your consent to it? A. Yes, sir.

Q. In the interpretation that is put on it now are you able to use the water as you did before?

A. Not quite. There has been a little difference. Up to this season I don't think it hurt us any much, but this season we have been hurt quite a bit by it by not having allotted to us as much water as we needed. [174]

(Testimony of William Ellsworth.)

Q. By not having as much as you needed or as much as you thought you were entitled to under the decree? A. Yes.

Q. Had that amount been allotted to you would you have used it while there was water in the river to use?

A. We would have used the biggest part of it.

Q. Has the failure to get that allotment in accordance with your contention as to the construction of the decree resulted in a substantial loss of water to you? A. Yes, sir.

Q. Has it resulted in a substantial loss of crops to you? A. Yes, sir.

Q. You requested an opinion from Mr. Gust as to the construction that should be placed on this decree? A. Yes, sir.

Q. He rendered that opinion? A. Yes.

Q. Does that opinion express what you understood you were getting at the time you consented to the decree?

A. Yes, sir, just exactly.

Q. Would the Upper Valley farmers have consented to it on the basis on which it is now being interpreted if they had known it?

A. Yes, sir, they would have accepted it on that statement of Mr. Gust.

Q. Would you have accepted it had you known it was to be interpreted as Mr. Firth is now interpreting it? [175]

A. I wouldn't have never signed it if I thought it was that way.

(Testimony of William Ellsworth.)

Q. Your consent to it was based on the idea that Mr. Gust expressed in his letter, is that it?

A. Yes, sir.

(Mr. Ellsworth excused).

Mr. Thompson: May it please the Court, in the questions that were propounded to Mr. Gust, reference is made to a certain letter addressed by Mr. Finney, the solicitor to the Secretary of the Interior in connection with the San Carlos Reclamation Project and the pending water adjudication suit, dated December 13th, 1930, to which Mr. Gust made answer in this proffer that we just made and it was referred to in the proffer as Exhibit No. 2. We would like, therefore, to have this document here marked as Petitioners' Exhibit Number 2 for Identification and have the record show that this is a copy of the letter about which Mr. Gust was answering and referring to in our proffer of proof, and it is now marked as Exhibit 2. And further, it is our understanding that counsel will not—they are retaining, of course, all of their objections, but they make no objection to this specifically on the ground that it is a copy.

Mr. Flynn: We make no objection to it as a copy, but do object to it on the grounds set forth in our objection to any testimony being offered at this time.

The Court: Very well. [176]

Following is a copy of

PETITIONERS' EXHIBIT No. 2

for Identification:

"United States of America
Department of the Interior
Washington, D. C.

August 17, 1939.

Pursuant to Title 28, Paragraph 661, United States Code, I hereby certify that the annexed is a true copy of the original as it appears on the records and files of this Department.

In witness whereof, I have hereunto subscribed my name, and caused the seal of the Secretary of the Interior to be affixed, the day and year first above written.

(Seal) (Sgd) OMAR L. CHAPMAN,
Assistant Secretary of the Interior.
United States of America
Department of the Interior
Office of the Solicitor

December 13, 1930.

In re: San Carlos Reclamation Project—
Pending water adjudication suit.

The Honorable

The Secretary of the Interior.

My dear Mr. Secretary:

After preliminary conferences, meetings were held in the Solicitor's office, December 12 and 13, and due to the evident desire of all to reach a fair

and equitable settlement of the matter, avoiding further litigation, a tentative suggestion or plan has been formulated:

1. The water-users in the Safford and other irrigation [177] districts in Arizona and New Mexico above the San Carlos Dam should be protected in so far as their lands placed under irrigation and agricultural use prior to the date of the San Carlos Act of 1924 or such other date as may be agreed upon, are concerned.

2. That the legal difficulties surrounding the situation, involving a stipulation and consent decree by the Court, may be worked out but will involve some further consideration by attorneys and engineers in Arizona.

3. That tentative plan considered at our conferences shall form the basis for a definite form of stipulation to be so worked out and submitted as soon as possible to yourself and to the Attorney General.

4. That if at some future time storage on the Upper Gila should become feasible for the benefits of the lands in the districts on the Upper Gila, no objection will be interposed, but on the contrary the Department will be favorable to such storage being provided by said water-users and the resultant utilization of the water, provided such storage and such utilization of water shall not interfere with the present proposed arrangements or with the rights of the San Carlos Project water-users.

Briefly, the tentative plan is to prepare and incorporate in a decree to be entered in the pending

law suit, a provision to the effect that the prior rights of the Pima Indians and of white settlers under the San Carlos Project, shall attach to and be first satisfied out of the flood water stored [178] in the reservoir; that unless and until the storage is provided on the upper river, the irrigation districts around Safford shall be entitled to continue the diversion and use of waters from the flow of the Gila to the extent that such use was being enjoyed in 1924 when the San Carlos Dam was authorized by Congress, or such other date as may be agreed upon; all of this to be subject, however, to the condition that if in any year there is not sufficient water in the Coolidge Reservoir to satisfy the priorities of the Indians and white lands having priorities in the San Carlos Project, the priorities of the Indians and of such white lands shall be entitled to be satisfied out of the natural flow of the river Gila.

We hope that this solution will avoid the necessity for further litigation in the pending suit and that it will result in preserving the equities of the Upper districts; that the Pima Indians will always have a prior right and also that there will be sufficient water for the irrigation and cultivation of the lands under the San Carlos Project, as now constituted.

(Sgd) E. C. FINNEY
Solicitor

Approved:

(Sgd) ROY LYMAN WILBUR,
Secretary." [179]

Mr. Thompson: If the Court please, there is, in one of the questions asked Mr. Gust and about which he made answer, reference to a letter addressed to Mr. William Ellsworth, President of the Gila Valley Irrigation District, Safford, Arizona, signed by Mr. Gust, dated February 17th, 1935, and in this proffer it is referred to as Exhibit No. 4, and we would now like just to proffer this document as Petitioners' Exhibit Number 4 for Identification, being the same instrument, or copy of the instrument referred to in Mr. Gust's statement.

The Court: I suppose the same objections?

Mr. Flynn: The same objections, and, of course — May I see that?

Mr. Thompson: Yes. (Handing document to counsel).

Mr. Flynn: We would like to have the further objection to this, your Honor, that it is apparent from its date that it is a blanket opinion by Mr. Gust subsequent to the entry of the decree, and I think it is subject to the further objection that it is self-serving in that it is an opinion by one of the attorneys who is a party to the decree.

Mr. Bilby: You don't object to that on the grounds it is a copy?

Mr. Flynn: No.

Following is a copy of

PETITIONERS' EXHIBIT FOR IDENTIFICATION NUMBER 4 [180]

“Copy

Kibbey, Bennett, Gust, Smith & Rosenfeld
Phoenix, Arizona

February 17, 1935.

Mr. William Ellsworth, President,
Gila Valley Irrigation District,
Safford, Arizona.

Dear Mr. Ellsworth:

I am in receipt of a letter from Mr. J. M. Wilson, submitting three questions of Mr. Firth, Water Commissioner, with reference to additional apportionments of water under Section 2 of Article VIII, page 106, of the Decree entered in the case of United States of America vs. Gila Valley Irrigation District, et al. The language to be interpreted is the following:

“That if and when at any time, or from time to time in any year, water shall flow into said reservoir after said date of first apportionment and shall be stored there and become added to the available storage water in said reservoir, the said Commissioner shall make further and additional apportionments to said defendants of the natural flow of said stream as the same is available at the diversion points of said defendants, which said apportionments shall in turn

correspond with and be equivalent in quantity to the amount of such accessions or newly available stored water supply; that in calculating apportionments of the stored water supply the Water Commissioner shall make appropriate deductions for losses for evaporation, seepage or otherwise that may be suffered between the time of the apportionment and that of the diversion of a corresponding quantity of water from the stream; that such apportionments, corresponding with the net accessions during each annual period after first apportionment, shall be made by said Water Commissioner at least as frequently as once per calendar month, (provided accessions to stored supply have occurred during that period) and at such more frequent intervals as the conditions in his judgment may demand—his decisions in these regards to be subject to summary review by the Court as provided in Article XII hereof.” [181]

It is apparent from the above quotation from the Decree that water included in such additional apportionment must meet three requirements, which are the following: First, the water must flow into the reservoir after the date of the last apportionment; Second, the water must be stored in the reservoir, and, Third, the water must become added to the available stored water in the reservoir.

It is, of course, apparent that all water flowing past the guaging stations at Calva and Peridot flows into the reservoir, and so meets requirement 1. It is also apparent that water flowing past the guaging stations at Calva and Peridot is stored in the reservoir. No particular time is required for storage. It is not possible to conduct water through the reservoir without the same becoming stored in the reservoir. It is, of course, possible to let out of the gates from the reservoir a quantity of water equal to the quantity that flows in, but this results in the water that is let out being deducted from the stored supply and the new water that flows in becoming stored water. Thus, all water that flows past the guaging stations at Calva and Peridot is stored in the reservoir.

The third requirement, however, is that to be considered as an apportionment, the water that flows into the reservoir must be 'added to the available stored water in said reservoir'. This requirement was inserted for the express purpose of eliminating from the apportioned water that was supplied from the reservoir to appropriators before the reservoir [182] who retained their rights in and to the natural flow of the stream. The natural flow of the stream into the reservoir cannot be conducted as such through water in the reservoir and delivered to the landowners below the reservoir to supply their rights of appropriation, but an equivalent amount of stored water in the reservoir can be let out as water flows into the reservoir from above,

and thus the prior appropriations of the landowners below the reservoir is supplied. Water flowing into the reservoir and becoming stored there when an equivalent amount of water was let out at the same time for the use of landowners not entitled to share in the stored supply, cannot be said to be added to the available stored supply.

Turning to the Decree, we find four appropriators for whom provision is made in the Decree for water delivery from the natural flow of the river:

Section 3, page 109, Kennecott Copper Company;

Also, Section 5, Page 110, Kennecott Copper Company;

Also, Section 1, Page 111, Joseph J. Anderson, Grady L. Herring and T. H. S. Glasspie.

Another possibility is that there may be prior rights of landowners not mentioned in the Decree, who were not in the San Carlos Project, for under Section 5, page 105, of the Decree, such landowners are entitled to water to supply their prior appropriations, if there are any such.

The above are all the deductions that we can find authorized to be made from the water flowing into the reservoir, except the allowance for evaporation and seepage. [183]

The question may be asked, why not deduct water permitted to flow out of the reservoir to supply lands, either white or Indian, that are included in the prior appropriations awarded the plaintiff:

The reason is that the Decree provides that these rights shall be supplied, not from the natural flow of the river in accordance with priorities, but from the total supply available on an equality with other lands in said white and Indian projects, regardless of prior appropriations. The Decree does not contemplate that any water be furnished to the white or Indian lands represented by plaintiff in the Decree from the natural flow of the river, but contemplates the supply of all lands in said white and Indian projects from the stored supply. See Section 5, page 107, and Article VI, page 105 of the Decree.

If it is contended that only the increase in the amount of stored water should be taken into consideration in the additional apportionment, we wish to say that if such had been the intention in framing the Decree, it would have been expressly stated that the Water Commissioner should make an additional apportionment of the additional amount in the reservoir found therein at the time of making the additional apportionment. If that had been the intention, the decree would have simply said that the Water Commissioner should measure the quantity of water in the reservoir at the time for each apportionment and make an additional apportionment of the increase in the reservoir over the amount that was therein at [184] the time of the last previous apportionment. That the interpretation we are making is the correct one is strongly indicated by the use of the word, 'accessions', which

appears in the next to the last line on page 106 of the Decree. An accession is something added to a supply, and is not susceptible of being interpreted as an increase. In other words, whatever is added is an accession, notwithstanding that at the same time there may be a depreciation from the total supply.

Under our interpretation as given above, the answer to Question 1, propounded by the Water Commissioner is 'No'. The answer to Question No. 2, propounded by the Water Commissioner, is 'No'. The answer to Question 3, propounded by the Water Commissioner, is 'No'.

The true rule to be followed is: Add to the water passing the *guaging* station at Calva since the last apportionment, the water passing the *guaging* station at Peridot since the last apportionment; deduct all water diverted by Kennecott Copper Company from the river in pursuance of the Decree since the last apportionment, all water diverted by Joseph J. Anderson, Grady L. Herring and T. H. S. Glasspie, in pursuance of the Decree since the last apportionment, and all water, if any, allowed to flow from the reservoir since the last apportionment to supply rights of appropriation not provided for in the Decree, and the amount thus arrived at will be the proper amount of the additional apportionment.

[185] To illustrate:

Let A equal the water passing *guaging* station at Calva since last apportionment;

Let B equal water passing *guaging* station at Peridot since last apportionment;

Let C equal water used by Kennecott Copper Company from river in *pursuant* of the Decree since last apportioned;

Let D equal water used by Anderson from river in *pursuance* of the Decree since last apportionment;

Let E equal water used by Herring from river in *pursuance* of the Decree since last apportionment;

Let F equal water used by Glasspie from river in *pursuance* of the Decree since last apportionment;

Let G equal water, if any, allowed to flow out of river to supply prior appropriations not provided for in the Decree;

Then A plus B, minus C, minus D, minus E, minus F, minus G, equals the additional apportionment which may be represented by H.

It occurs to us that when the amount of the additional apportionment is thus determined, it will be advisable to arrive at a revised total of the amount of substituted storage available for the Upper Valleys, as of the date of such apportionment. This may be arrived at as follows:

Let I equal the last apportionment;

Let J equal the substituted storage water used by Upper Valleys since last apportionment;

Let K equal allowance for evaporation since last apportionment;

Then, I minus J, minus K, plus H, equals L, being the amount of substituted storage available at the date of the last apportionment, [186] of which proper publication should be made, as well as of the item K above indicated.

Very truly yours,

KIBBEY, BENNETT, GUST,
SMITH & ROSENFELD,

(Sgd) J. L. GUST

g.b

copy

CR"

Mr. Thompson: If the Court please, in our petition there is an allegation that this interpretation we are asking for, as compared to the interpretation made by the Commissioner, which results in a loss to us of a substantial quantity of water per year, I think it is approximately one acre foot per year, and at this informal hearing we had, a statement was presented by Mr. Firth, the Water Commissioner, showing a computation of the additional amount of water we would have received in the year 1938 had the Decree been administered under the interpretation we contend for rather than the manner in which the Commissioner was interpreting it. This computation was made in writing and submitted at that hearing, and referred to there as Exhibit No. 1. We would like to offer this with the avowal, that if the witness Firth, the Water

Commissioner, were called and examined on that subject that he would swear the figures setting up this computation were made by him and showed, in his opinion, the approximate difference in the amount of water that would be obtained under the two interpretations. We are doing [187] this not only to support the allegations of our petition but to show that this is not a moot question, that the results are substantial. We want to offer this with the avowal that the Commissioner will state that he made it and that those figures are his figures. This would be Petitioners' Exhibit Number 5. This was also offered at that hearing and marked.

Mr. Flynn: I think you better state in the record what it consists of.

Mr. Bilby: There are two sheets of the exhibit. The first sheet is an excerpt from the opinion or letter written by Mr. Gust, being Petitioners' Number 4, was it not?—and contains a copy of the formula for computation set forth by Mr. Gust in that opinion; the second sheet of the exhibit is a computation of the Water Commissioner, Mr. Firth, showing the additional amount of water that would result to the Upper Valley users through the use of this formula. That would be Petitioners' Exhibit 5.

Mr. Flynn: And the record will show our objection to it on the grounds heretofore stated.

The Court: Very well.

Copy of

PETITIONERS' EXHIBIT NUMBER 5
FOR IDENTIFICATION:

“METHOD OF MAKING AN APPORTIONMENT TO THE ‘UPPER VALLEY’ AS SET OUT IN THE OPINION OF JOHN L. GUST:

The true rule to be followed is: Add to the water passing the gaging station at Calva since the last apportionment, the water passing the gaging station at Peridot since the last apportionment. Deduct all water diverted by Kennecott Copper Company from the river in pursuance of the [188] Decree since the last apportionment, all water diverted by Joseph J. Anderson, Grady L. Herring and T. H. S. Glasspie in pursuance of the Decree since the last apportionment, and all water, if any, allowed to flow from the reservoir since the last apportionment to supply rights of appropriation not provided for in the Decree, and the amount thus arrived at will be the proper amount of the additional apportionment.

To illustrate—

Let A equal the water passing gaging station at Calva since last apportionment;

Let B equal water passing gaging station at Peridot since last apportionment;

Let C equal water used by Kennecott Copper Company from river in pursuance of the Decree since last apportionment;

Let D equal water used by Anderson from river in pursuance of the Decree since last apportionment;

Let E equal water used by Herring from river in pursuance of the Decree since last apportionment;

Let F equal water used by Glasspie from river in pursuance of the Decree since last apportionment;

Let G equal water, if any, allowed to flow out of river to supply prior appropriations not provided for in the Decree;

Then A plus B, minus C, minus D, minus E, minus F, minus G, equals the additional apportionment which may be represented by H.

It occurs to us that when the amount of the additional apportionment is thus determined, it will be advisable to arrive at a revised total of the amount of substituted storage available for the Upper Valleys, as of the date of such apportionment. This may be arrived at as follows:

Let I equal the last apportionment;

Let J equal the substituted storage water used by Upper Valleys since last apportionment;

Let K equal allowance for evaporation since last apportionment; [189]

Then I minus J, minus K, plus H, equals L, being the amount of substituted storage available at the date of the last apportionment,

of which proper publication should be made as well as of the Item K above indicated.

Using Mr. Gust's method and applying the values for the year 1938 up to October 1, we have:

A =	84,210	acre feet
B =	15,030	acre feet
C =	2,252	acre feet
D =	406	acre feet
E =	0	acre feet
F =	0	acre feet
G =	0	acre feet

$$A + B - C - D - E - F - G = H$$

$$(84210) + (15030) - (2252) - (406) - (0) - (0) - (0) = (96582)$$

$$I = 54,250 \text{ (available stored water 1-1-39)}$$

$$J = 0$$

$$K = 13,607 \text{ acre feet}$$

$$- J - K + H = L$$

$$(54250) - (0) - (13067) + (96582) = 137,225 \text{ acre feet}$$

which would be the amount of water apportioned to the Upper Valleys by this method. This would amount to an apportionment of 3.38211 acre feet per acre.

By the method of the Water Commissioner, there has been apportioned to the Upper Valleys up to October 1, 1938, an amount of 102,437 acre feet which amounts to 2.52474 acre feet per acre.

The difference of these two methods would be 34,788 acre feet which amounts to 0.85737 acre feet per acre." [190]

Mr. Bilby: Now, if your Honor please, we have one other witness whom we feel it is essential to call, because he is a representative of and the only testimony we would have to offer on this question from the Upper District, from the district beyond Duncan there. We want to call Mr. Frank McGrath, and ask him some questions, and obtain some answers under the same conditions of offer of proof and we will make them as short as possible.

Mr. Flynn: Cannot you make a statement of what his testimony would be?

Mr. Bilby: I think it would be quicker the other way.

The Court: You want to offer the testimony of the witness on the stand instead of letting the record show what his testimony, if presented, what his testimony would be?

Mr. Bilby: Yes, your Honor, because we have no statement of his testimony like we do of the others; if we had it in that form, I might inform the Court that it would be substantially the same as the testimony of these other witnesses, with certain exceptions. Of course, he is situated different from Mr. Gust, he is not an attorney, he is a land-owner in the Upper District, and he is not from the same district as Mr. Ellsworth and Mr. Wilson, but his testimony with reference to the intent of the parties with regard to this question would be substantially the [191] same as the other witnesses.

The Court: You are familiar with what the witness would testify to if permitted to testify, so that

you will be able to make a statement of what the testimony would be?

Mr. Bilby: I believe I could.

The Court: That would be in keeping with the other proffers.

Mr. Bilby: Very well, your Honor. We also offer to prove that if the witness, Frank McGrath, who is present and available and could be called if your Honor would permit, if he were called and sworn as a witness and permitted to testify, that in response to questions he would swear that his name is Frank McGrath, that he is a resident of Greenlee County at Franklin, Arizona, and is a landowner in the Franklin Irrigation District; that during the period of time while this decree was being drafted and discussed and while the litigation was pending over priorities between the parties and testimony was being taken before the Master appointed by the Court, bearing upon the subject of priorities, that he was Secretary of the Franklin Irrigation District and, I believe, a member of the Board of Directors of that District; that he represented his District in the sense that he appeared on their behalf at most of the conferences that were held during that period of years, beginning back, I should say, in 1930, perhaps up to the date of the decree in 1935; that at these conferences that he participated in the discussions [192] that were had and understood what was said by the various parties; that at those conferences government representatives were present, consisting of Mr. Trues-

dale, Mr. Smith and others, Mr. Walthen, Mr. Southworth and various other government representatives who participated in this matter; that when the question of substituted storage came up, there was considerable discussion as to the manner of putting the substituted storage plan into effect, and various plans were suggested; that during these conferences that the government representatives, particularly Mr. Truesdale, contended for a plan similar to the method now practiced by the Commissioner; that that plan was objected to by Mr. McGrath and the people he represented, and that before the decree was finally signed and before he and the land owners and water users of his district would consent to it being signed, it was their understanding and they were assured by their own attorneys and by the attorneys and representatives of the government that the interpretation now contended for by the petitioners was what the decree meant, and the manner in which the decree would be interpreted; that is to say, that all waters running into the lake made by the dam, except such waters as were taken by persons not parties to the decree, by the Kennecott Copper Company and Anderson and others, that all waters except those, running into the reservoir, were to be considered as stored waters and taken into account in making apportionments to the Upper Valley users; that it was upon this basis and no other that he, on behalf of the people he represented, and [193] the other people in that district consented to the decree being

signed in the form in which it was signed; that Mr. A. R. Lynch was the attorney representing that district and worked in connection with and in cooperation with Mr. Gust, who represented the Gila Valley District; that he and his people in that district were advised by their attorney, Mr. Lynch, and also advised by Mr. Gust, prior to consenting that this decree might be signed on their behalf, that the decree did mean that all waters running into the reservoir, save and except those I have mentioned as being excepted, were to be considered as stored waters and taken into account in making the apportionment; that in such apportionment all waters running into the reservoir save and except those heretofore stated, Glasspie, Herring, Kennecott Copper Company and Anderson, would be taken into account and apportionment would be made of an equivalent amount; he would further testify that most of the negotiations regarding the matter of substituted storage, arose after the receipt of the letter signed by the solicitor of the Department of the Interior and approved by the Secretary of the Interior, dated December 13, 1930, and offered by the Petitioners as Exhibit Number 2; he would testify that after receipt of that letter the parties to the negotiations understood and agreed that the Upper Valley users were to be left in substantially the same condition as they were before the San Carlos Act, that is, that they would be permitted to use the water in the [194] same manner as theretofore they had used it, and the discussion

was concerning the means of putting that understanding and agreement into effect; that after the receipt of the letter of December 13th, 1930, all parties agreed that in accordance with the direction of the Secretary the Upper Valley users were to be permitted to use the waters as they had theretofore used it; that it was his understanding and agreement, in so far as he agreed, that that object would be accomplished through taking into account and considering as stored water all water running into the reservoir save and except the amount which I have heretofore stated as excepted.

Mr. Flynn: I think, as to this offer, we would like the additional objection that it largely consists of opinions and conclusions of the witness, in addition to those other objections which have been made to the offer of any testimony.

The Court: Well, the objections to the proffer of testimony will be sustained.

Mr. Thompson: I suppose, your Honor, upon the ground that the Court does not find the decree ambiguous?

The Court: As indicated in the interpretation.

Mr. Thompson: May it please the Court, as I recall the record, I think I am correct, the Court's instruction in this matter is dated November 13th, 1939, which means, of course, that the ninety days for appeal in this matter will very shortly expire. What we would like to ask the Court to [195] do and indulge us in, would be to vacate the instruc-

tion heretofore made and enter the same instruction as of this date. We cannot see that any one's rights would be prejudiced thereby, and it would permit us to take a reasonable time in the matter of the appeal; we realize the fact that we have been somewhat slow, but the holidays have intervened and we have had a number of matters to consider for our clients, but they have determined to appeal and would like the indulgence of the Court, if it is in order.

The Court: The only situation in regard to that is this: the ruling in the petition for review of the action of the Water Commissioner is yet to be made; the interpretation was an incidental inquiry into the questions raised by the petition and now, when a ruling, when this petition is finally disposed of, if it is adverse to the petitioners, their appeal would be available to them without regard to disturbing this incidental instruction which was raised by the inquiry into the petition.

Mr. Thompson: I didn't know how the Court would consider it, whether he would consider this instruction was incidental, but we had thought that under the petition there would probably be some supplemental order; but of course, if that is the Court's understanding, then we are incorrect, and I don't see that there would be any purpose in it.

The Court: Do counsel for the Government want to [196] be heard on what the Court has indicated its position is, so far as concerning what action should be taken at this time?

Mr. Flynn: I think, of course, if the counsel for the Petitioners are interested in their record, it appears to me that the Court may enter an order now upon that petition, that that might be done.

Mr. Bilby: As I understand, when the Court is ready to rule on our petition, which has not been ruled upon yet, your Honor will make an order at that time, and that would be the order from which we would appeal; the instructions heretofore made are not a ruling on our petition.

The Court: The Court merely announced a ruling or instruction that it had found and announced in an instruction on the decree, because the question is whether the Water Commissioner has been properly administering the water under the decree.

Mr. Bilby: And the final ruling on the petition will be made after the proffer of this evidence and will be in the nature of an order instructing the Commissioner, I take it.

The Court: Yes. Is there any further testimony to be admitted under your proffer?

Mr. Bilby: No, your Honor.

The Court: Well, do counsel desire to be heard now any further in reference to this testimony that has been offered at this time, or to offer any further testimony? [197]

Mr. Flynn: Of course, your Honor, I don't want to offer any testimony if the Court has ruled on their offer, and of course, if their testimony would be admitted, then we would want consideration from the Court; naturally, we would want to meet that

testimony if it would be entered and taken into consideration by the Court in determining this decree, but if the ruling is that this offer is denied, then, of course, we don't want to offer any.

The Court: I don't understand.

Mr. Flynn: I say, if the offer of this proof is denied, then we are content to rest with that; if that evidence were to be admitted and taken into consideration by the Court, naturally we would want to meet it. The Court has already ruled?

The Court: Yes. Is there anything, without the necessity of the Court going through some of the matters that have been offered here, in the way of a tender, are there any other matters for the Court's consideration except the matter of the Court's ruling on the instruction and matters of that character offered by the petitioners, that the Court should examine, other than the matters on which the ruling of the Court has already been passed?

[198]

Mr. Thompson: Of course, your Honor, I take it that the Court has already considered the briefs of counsel. Our position is that the decree means what we have contended it meant all the way along and that, if it doesn't mean that, certainly no one could say that it clearly means what the Government contends it means, and therefore, under the rule, would be ambiguous and we would be entitled to a submission of testimony on the issues of what was intended by the Petitioners. We have always felt that, and feel, that after the reading of it by the

Court, that in fairness to all of us, it was impossible to say that it clearly does not mean what we contend it means and clearly means what the Government contends it means, and that is our position.

Mr. Bilby: And that is what this testimony is offered for, to bear upon that question of what it did mean and clarify what it did mean.

The Court: I have noted the prayer in the petition of the Petitioners, and the question occurs to the Court as to the form of order that the Court shall enter. The Court has already heard the respective parties on this petition, and the question in the Court's mind is as to the form of the order in denying the relief asked for in the petition, and that will be the form of the order, Gentlemen, and the ruling asked for in the petition will be denied.

Mr. Thompson: May it please the Court, I am just creeping along here myself and am not sure just what the procedure is, and I would call your Honor's attention to page 112, paragraph 12, of the original Decree, for that was the provision under which this petition was filed. Wouldn't it of necessity, in any order made by the Court, wouldn't he have to make the order in the nature of a finding [199] that what the Commissioner is now doing is proper and therefore denying the relief asked for?

The Court: It may be that, but I think this question of whether the administration is being conducted in a proper manner under the decree seems to be of an informal nature and may be raised and inquiry made into what the Water Commissioner

has done; of course, the record has proceeded to that point where that is shown, and the order should be confirming the action of the Water Commissioner.

Mr. Thompson: If we are entitled to appeal, we would like to have the matter squarely considered by the Circuit Court, and it seems to me that we raise an issue here as to whether the Commissioner is proceeding properly, and if the Court finds that he is proceeding properly and denies us any relief, then it would be clear what the issue is and what our assignment of error would be, that is very clear, whereas, if the Court merely denies the relief it might be based on any other number of reasons, and with the Court's findings we feel it doesn't present the position properly and we would like to have our record to that extent.

The Court: Do you want to be heard on that form of the order?

Mr. Flynn: We are satisfied with the order announced by the Court, but I think from the Petitioners' standpoint, that the instructions, which are a part of this case and given by the Court, probably would answer the purpose they are talking about.

[200]

Mr. Bilby: If the Court please, the Court has announced its decision, and why not permit counsel time to get together on the proper kind of an order, and present it to the Court?

The Court: Very well, you may do so and present it to the Court at two o'clock. If there is noth-

ing further to be heard now, the Court will re-convene at two o'clock. [201]

State of Arizona,
County of Pima—ss.

I, Gertrude E. Mason, do hereby certify, that I am deputy to the official reporter of the United States District Court at Tucson, Arizona; that as such deputy court reporter I was present at the hearing in the above entitled matter before the Hon. Albert M. Sames, Judge of the District Court aforesaid, and took down in shorthand notes the proceedings at said hearing, including all proffers of proof and avowals by counsel, all objections, rulings and arguments before the Court; that I have transcribed my shorthand notes into typewriting, the foregoing, on seventy-seven pages, being a full, true and correct transcript thereof, to the best of my skill and ability.

Witness my hand this 1st day of March, 1940.

GERTRUDE E. MASON,
Deputy Court Reporter.

[Endorsed]: Filed April 15, 1940. [202]

[Endorsed]: No. 9527. United States Circuit Court of Appeals for the Ninth Circuit. Gila Valley Irrigation District, Franklin Irrigation District, Roy A. Layton, Milton Lines, William Waldrom, Roy D. Williams, and J. D. Wilkins, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed May 22, 1940.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
in and for the Ninth Circuit

No. 9527

GILA VALLEY IRRIGATION DISTRICT,
et al.,

Appellants,
vs.

UNITED STATES OF AMERICA,
Appellee.

STATEMENT OF POINTS

Pursuant to paragraph 6 of Rule 19 of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit, the appellants, by their attorneys,

hereby state the points on which they intend to rely on the appeal of the above entitled matter, to-wit:

1. That the United States District Court for the District of Arizona erred in rendering its certain "Order on Petition to Review Action", dated January 22, 1940, holding that the provisions of the Decree of June 29, 1935, directed the Water Commissioner to make apportionments to the upper valley users in the manner set forth in said Order, and confirming the actions of said Water Commissioner in apportioning the water described therein in the manner set forth in said Order.
2. That the United States District Court for the District of Arizona erred in rendering its certain "Order on Petition to Review Action of Water Commissioner", dated January 22, 1940, holding that the provisions of the Decree of June 29, 1935 relating to "stored water" are clear and unambiguous.
3. That the United States District Court for the District of Arizona erred in sustaining appellee's objections to the introduction of proof by appellants to show the true intent and meaning of the Decree of June 29, 1935, relating to the apportionment of water to upper valley users.

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Attorneys for Appellants

Copy recd. this 18th day of May, 1940.

F. E. FLYNN

U. S. Attorney S

[Endorsed]: Filed May 22, 1940. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.

DESIGNATION OF PRINTED
RECORD

Pursuant to the provisions of Paragraphs 6 of Rule 19 of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit, Appellants hereby designate the following portions of the transcript of record as the printed record in the above entitled appeal, to-wit:

	Transcript
	Page
1. Petition to Review Action of Water Commissioner	205
2. Answer of Plaintiff to Petition.....	211
3. Answer of Water Commissioner to Petition	214
4. Minute Entry of September 25, 1939 allowing adoption of Water Commis- sioner's Answer by United States....	222
5. Order on Petition.....	227
6. Transcript of Evidence.....	125
7. Stipulation concerning contents of record on appeal.....	235

Dated May 20, 1940.

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[Endorsed]: Filed May 22, 1940. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION

It is herein and hereby stipulated by and between counsel for Appellants and Appellee, that in making up the designation of parts of contents of record on appeal and record on appeal the Clerk of the United States District Court, for the District of Arizona, shall certify a copy of the decree entered herein June 29, 1935, including the stipulation for consent to the entry of said decree, as printed by the United States Government Printing Office in 1935 (as shown on the last page thereof), along with the record.

It is further stipulated that the Appellants herein shall furnish to the Clerk of the United States District Court a copy of said printed decree and stipulation, to be certified by said Clerk, and will also furnish to said Clerk four other copies of said decree and stipulation, which need not be certified.

It is further stipulated that the said printed decree and stipulation shall not be printed as a part of the record in this case, but that said decree and stipulation may be considered by the Court as a part of the record in this case for the purpose of appeal, and all the parts of said decree and stipulation which shall be referred to in the briefs shall be published in the appendix to such briefs.

Dated May 20, 1940.

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So ordered.

CURTIS D. WILBUR

Senior United States Circuit Judge

[Endorsed]: Filed May 27, 1940. Paul P. O'Brien,
Clerk.

